

269  
J. P. Starn  
**TRANSCRIPT OF RECORD**

---

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM 1924 1925**

**No. 24 24**

---

**WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN  
ERROR,**

**vs.**

**THE STATE OF GEORGIA AS OWNER OF WESTERN &  
ATLANTIC RAILROAD AND NASHVILLE, CHATTA-  
NOOGA & ST. LOUIS RAILWAY, AS LESSEE, ETC.**

---

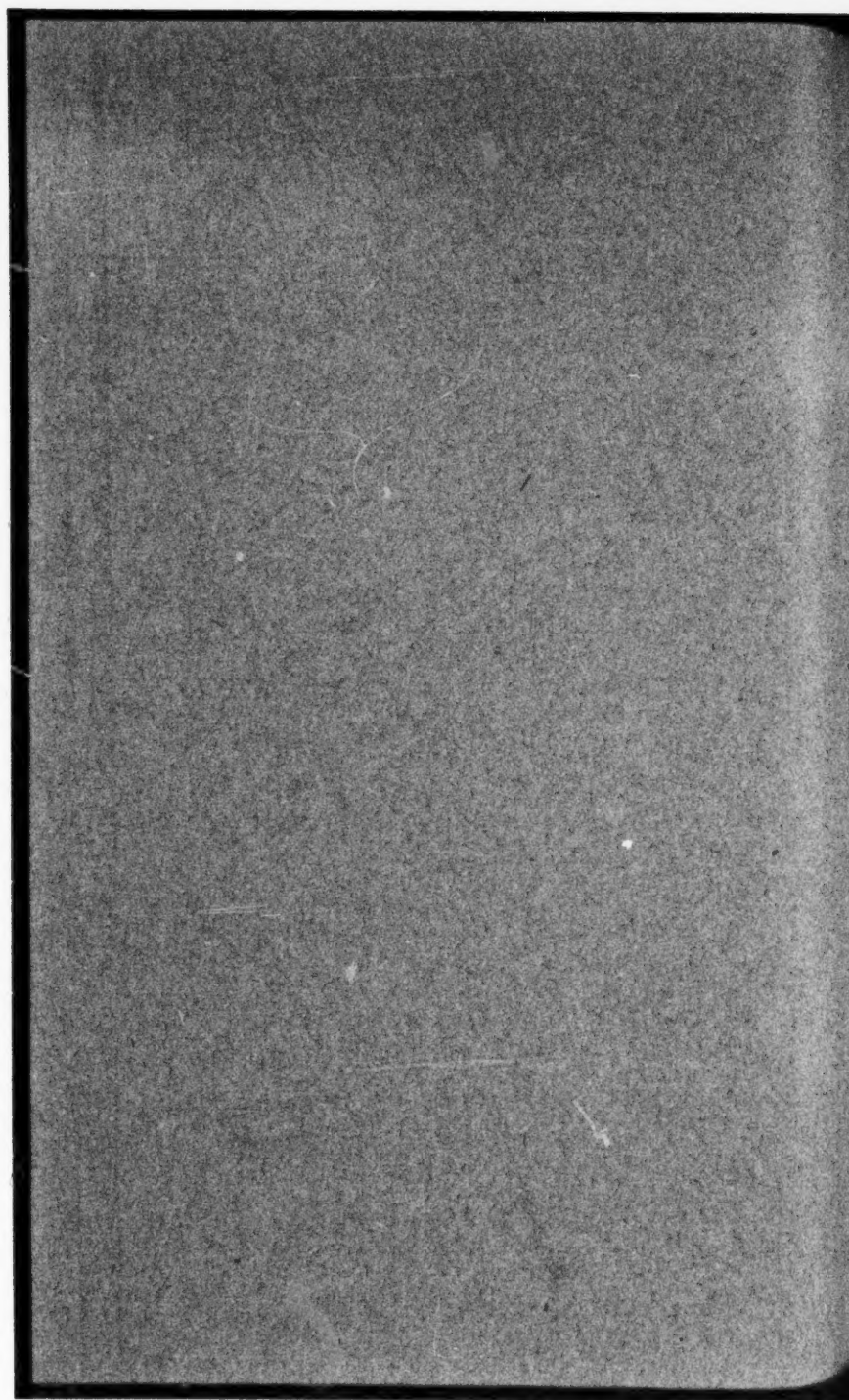
**IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA**

---

*300. In re The State of Georgia*  
**FILED DECEMBER 13, 1925**

**(20,012)**





(30,012)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 702

WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN  
ERROR,

*vs.*

THE STATE OF GEORGIA AS OWNER OF WESTERN &  
ATLANTIC RAILROAD AND NASHVILLE, CHATTA-  
NOOGA & ST. LOUIS RAILWAY, AS LESSEE, ETC.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA

INDEX

	Original	Print
Proceedings in supreme court of Georgia.....	4	1
Petition for writ of error.....	4	1
Exhibit 1 to Petition—Georgia Act of 1847 permitting tele- graph companies to use highways.....	52	36
Exhibit 2 to Petition—Statement of contract between W. & A. R. R. Co. and Garst & Bean.....	53	36
Exhibit 3 to Petition—Act of 1852 incorporating the Au- gusta, Atlanta & Nashville Magnetic Telegraph Co.....	55	38
Exhibit 4 to Petition—Extract from Georgia Code of 1910..	57	39
Exhibit 5 to Petition—Resolution of W. & A. R. R. Com- mission .....	58	39
Order allowing writ of error.....	59	40
Assignment of error.....	60	40
Writ of error.....	100	69
Citation and service..... (omitted in printing) ..	102	70
Bond on writ of error..... (omitted in printing) ..	103	70
Certificate of lodgment.....	106	71

	Original	Print
Præcipe for transcript of record.....	107	71
Record from Fulton superior court.....	111	74
Petition .....	111	74
Summons and service.....(omitted in printing) ..	117	78
Answer .....	118	78
Exhibit 1 to Answer—Letter, W. L. Mitchell to Garst & Bean, October 11, 1850.....	166	108
Exhibit 2 to Answer—Agreement between Alvin D. Hammett and Wm. S. Morris et al.....	166	109
Exhibit 3 to Answer—Deed, A. D. Hammett to Wm. S. Morris et al., September 1, 1858.....	168	110
Exhibit 4 to Answer—Deed, Geo. L. Willy to Wm. S. Morris et al., November 13, 1858.....	170	111
Exhibit 5 to Answer—Deed, Wm. S. Morris et al. to American Telegraph Co., December 28, 1859.....	172	112
Exhibit 6 to Answer—Agreement between American Telegraph Co. and Western Union Telegraph Co., June 12, 1866.....	174	114
Exhibit 7 to Answer—Agreement between Western Union Telegraph Co. and W. & A. R. R. Co., August 18, 1870.....	178	116
Exhibit 8 to Answer—Receipt, W. U. Telegraph Co. to W. & A. R. R. Co., September 11, 1876.....	182	119
Exhibit 9 to Answer—Resolution of executive committee of W. & A. R. R. Co.....	183	120
Exhibits 10 and 11 to Answer—Act of General Assembly of Tennessee.....	184	120
Exhibit 12 to Answer—Extracts from the Code of Tennessee .....	186	121
Exhibit 13 to Answer—Resolution of board of directors of W. U. Telegraph Co., June 5, 1867.....	187	122
Exhibit 14 to Answer—Resolution of W. & A. R. R. Commission.....(omitted in printing) ..	188	122
Motion to strike answer.....	189	122
Order on motion to strike.....	204	131
Exceptions to order on motion to strike.....	205	131
Amended answer.....	210	134
Exhibit 1 to Amended Answer—Correspondence.....	215	138
Exhibit 15 to Amended Answer—Deed, Augusta, Atlanta, and Nashville Magnetic Telegraph Co. to Wm. Pylus et al., January 29, 1855.....	218	139
Exhibit 16 to Amended Answer—Deed, Augusta, Atlanta, and Nashville Magnetic Telegraph Co. and J. Washburn & Co., January 29, 1855.....	221	141
Exhibit 17 to Amended Answer—Deed, Augusta, Atlanta, and Nashville Magnetic Telegraph Co. to Samuel Clarke, March 17, 1855.....	223	143
Exhibits 18 and 19 to Amended Answer—Sheriff's returns to writs of fieri facias.....	226	145
Amended answer of W. U. Tel. Co.....	231	147

# INDEX

iii

	Original	Print
Exhibit 20 to Amended Answer—Letter, Wm. S. Morris and Thos. H. Wynne to Col. E. E. Sanford.....	270	172
Exhibit 21 to Amended Answer—Assignment, Confederated Telegraph Co. to American Telegraph Co., June 20, 1865.....	276	176
Exhibit 22 to Amended Answer—Abstract of title relied upon by defendant.....	277	176
Motion to strike amendments to answer.....	281	179
Order on plaintiffs' motion to strike.....	305	195
Order striking certain parts of amendments to answer....	306	195
Defendant's exceptions and objections to order striking parts of amendments.....	307	196
Brief of evidence.....	311	199
Exhibits in Evidence—Extracts from Code of Georgia.	311	199
Extracts from Georgia constitution .....	311	199
Extracts from an act for the construction of W. & A. R. R..	312	199
Extracts from an act amending act for construction of W. & A. R. R.....	315	201
Acts amending act to construct W. & A. R. R.....	317	203
Extracts from Code of Georgia.	330	210
Acts amending act to construct W. & A. R. R.....	330	210
Acts of State of Tennessee authorizing Georgia to extend W. & A. R. R.....	333	212
Act of State of Tennessee incorporating Nashville & Chattanooga R. R. Co.....	334	213
Act of State of Tennessee incorporating Hiawassee R. R. Co.	337	215
Act of State of Georgia authorizing lease of W. & A. R. R....	343	218
Extracts from lease, R. B. Bullock to W. & A. R. R. Co.....	344	219
Act of State of Georgia re lease of W. & A. R. R.....	344	219
Extracts from lease, John B. Gordon to N., C. & St. L. Ry. Co. ....	345	219
Act of State of Georgia re lease of W. & A. R. R.....	346	220
Lease, N. E. Harris to N., C. & St. L. Ry.....	349	222
Act of State of Georgia re lease of W. & A. R. R.....	362	230

	Original	Print
Exhibits in Evidence—Joint resolution of General Assembly of Georgia discharging W. & A. R. R. Commission....	364	231
Order of R. R. Commission of Georgia appointing counsel...	365	231
Testimony of Hunter McDonald.....	368	233
Testimony of R. R. Hobbs.....	385	243
Exhibit in Evidence—Extracts from pleadings.....	392	247
Exhibit A in Evidence—Letter, Western Union Telegraph Co. to W. & A. R. R. re condemnation of right of way.....	406	257
Exhibit A to Petition in Case No. 27274—Letter, Western Union Telegraph Co. to State of Georgia re condemnation of right of way.....	416	263
Testimony of J. Houston Johnson.....	421	265
J. P. Anderson.....	423	267
M. S. Eanson.....	426	269
Exhibit in Evidence—Contract between L. & N. R. R. Co. and W. U. Tel. Co., June 18, 1884.....	430	271
Exhibit in Evidence—Extracts from act of General Assembly of Georgia to incorporate the A., A. & N. Mag. Tel. Co.....	445	280
Testimony of D. H. Collins.....	448	282
T. N. Hardin.....	448	282
Andrew E. Burlie.....	449	283
George W. E. Atkins.....	450	283
C. W. Terrell.....	461	290
James M. Stephens.....	462	291
J. W. Lawton.....	464	292
J. E. Eubanks.....	464	292
George M. Wilson.....	465	293
W. Perry Bloodworth.....	468	295
Arthur Heyman.....	470	296
H. C. Worthen.....	472	297
L. H. Beck.....	473	298
G. W. E. Atkins (recalled).....	473	299
Exhibits in Evidence—Correspondence.....	475	299
Testimony of John S. Holladay.....	481	303
Exhibits in Evidence—Extracts from act of the General Assembly of New York, April 12, 1848.....	482	303
Extracts from acts amending above act.....	483	304
Extracts from articles of incorporation of New York & Mississippi Valley Printing Telegraph Co.....	486	305
Extracts from resolutions and acts of assembly, etc.....	487	306



# INDEX

v

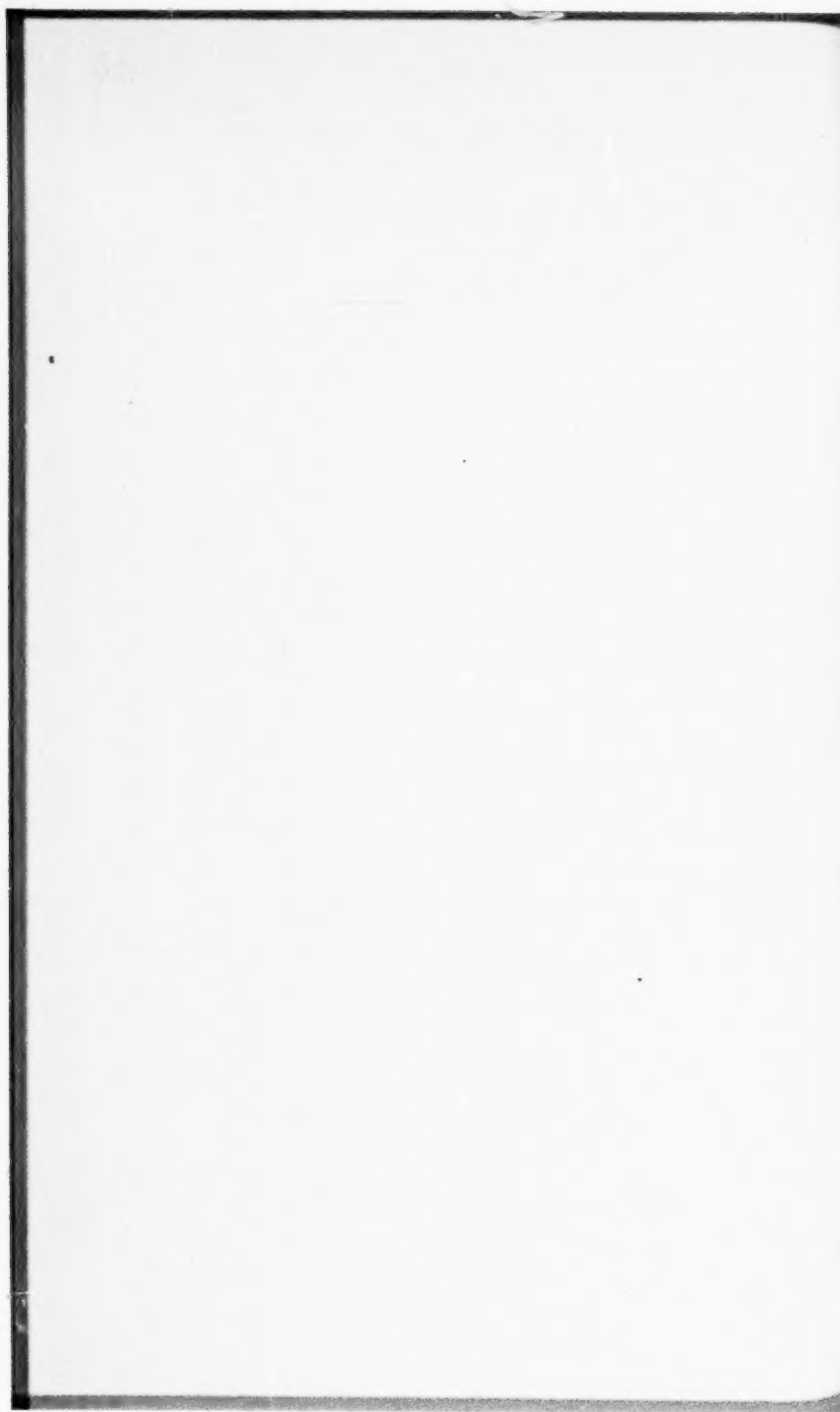
	Original	Print
<b>Exhibits in Evidence—</b> Resolution of General Assembly of Georgia, December 20, 1853 .....	487	306
Extract from answer of W. U. Tel. Co.....	489	307
Order settling brief of evidence.....	489	308
Charge of the court.....	490	308
Questions of fact answered by jury and verdict.....	531	334
Decree .....	534	335
Bill of exceptions.....	536	336
Verdict.....(omitted in printing)..	536	
Decree.....(omitted in printing)..	540	337
<b>Motion for new trial.....</b>	543	338
Order to show cause.....	547	339
Order overruling motion for new trial.....	548	340
Amendment to motion for new trial.....	549	340
Exhibit A to Amendment—Act to authorize the construction of the magnetic telegraph.....	737	452
Exhibit B to Amendment—Deed, A., A. & N. M. Tel. Co. to Wm. Pylus et al., January 29, 1855 (omitted in printing) .....	738	453
Exhibit C to Amendment—Deed, A., A. & N. M. Tel. Co. to J. Washburn & Co., January 29, 1855 (omitted in printing).....	741	453
Exhibit D to Amendment—Deed, A., A. & N. M. Tel. Co. to Samuel Clark, March 17, 1855 (omitted in printing) .....	744	453
Exhibit E to Amendment—Sheriff's return to writ of fieri facias.....(omitted in printing)..	746	453
Exhibit F to Amendment—Clerk's certificate to above deeds .....	748	453
Exhibit G to Amendment—Sheriff's return to writ of fieri facias.....(omitted in printing)..	749	454
Exhibit H to Amendment—Agreement between A. D. Hammett and Wm. S. Morris et al., August 12, 1858.	751	454
Exhibit I to Amendment—Deed, A. D. Hammett to Wm. S. Morris et al., September 1, 1858.....	753	455
Exhibit J to Amendment—Deed, Geo. L. Willy to Wm. S. Morris et al., November 13, 1858.....	755	456
Exhibit K to Amendment—Deed, Wm. S. Morris et al. to American Telegraph Company, December 28, 1859.	759	459
Exhibit L to Amendment—Letter, Wm. S. Morris and Thos. H. Wynne to Col. E. S. Sanford (omitted in printing).....	761	460
Exhibit M to Amendment—Assignment, Confederate Telegraph Co. to American Telegraph Co., June 20, 1865.....(omitted in printing)..	767	460
Exhibit N to Amendment—Agreement between American Telegraph Co. and Western Union Telegraph Co., June 12, 1866.....	768	460

	Original	Print
Exhibit O to Amendment—Minutes of special meeting of board of trustees of American Telegraph Co., June 12, 1866.....	772	463
Exhibit P to Amendment—Minutes of adjourned meeting of board of directors, June 14, 1866.....	774	465
Exhibit Q to Amendment—Petition of Enoch R. Mills in Fulton superior court in case of Miller vs. A., A. & N. M. Tel. Co.....	775	466
Summons .....	782	470
Answer .....	782	471
Verdict .....	782	471
Judgment .....	783	472
Clerk's certificate.....	783	472
Exhibit Q-2 to Amendment—Verdict and clerk's certificates in above case.....	784	473
Exhibit R to Amendment—Petition of Alfred M. Coffin in inferior court of Fulton County in case of Coffin vs. A., A. & N. M. Tel. Co.....	786	474
Summons .....	788	476
Answer .....	788	476
Order transferring case to appeal.....	788	476
Clerk's certificate.....	789	477
Exhibit S to Amendment—Agreement between Western Union Tel. Co. and W. & A. R. R. Co., August 18, 1870 .....	790	477
Exhibit T to Amendment—Record in D. C. U. S., northern district of Georgia, in case of Western Union Telegraph Co. vs. Western & Atlantic R. R. Co.	794	480
Bill of complaint.....	794	480
Answer .....	803	486
Exhibit C to Answer—Letter, Joseph E. Brown to Wm. Orton, March 18, 1871.....	808	490
Exhibit D to Answer—Statement of account of W. & A. R. R. with Western Union Telegraph Co.....	811	491
Cross-bill .....	812	492
Order denying injunction.....	816	495
Order sustaining demurrer to cross-bill.....	817	496
Order dismissing bill.....	817	496
Exhibit U to Amendment—Opinion of Mr. Justice Miller in case of Western Union Telegraph Co. vs. Western and Atlantic R. R. Co., 91 U. S., p. 283.....	818	496
Exhibit V to Amendment—Letter, Wm. McRae to Norman Green, Esq., September 12, 1876.....	824	500
Exhibit W to Amendment—Resolution of executive committee of Western & Atlantic R. R. Co., September 11, 1876.....	825	501
Exhibit X to Amendment—Receipt, W. U. Tel. Co. to W. & A. R. R. Co. for \$4,000.00.....	826	501

# INDEX

vii

	Original	Print
Exhibit Z to Amendment—Resolution No. 41 of Georgia Senate and House of Representatives, October 22, 1887 .....	827	502
Exhibits AA to KK, Inclusive, to Amendment—Resolutions and acts of Georgia Senate and House of Representatives .....	828	503
Exhibits LL to OO, Inclusive, to Amendment—Acts and laws of State of Tennessee.....	841	511
Exhibit PP to Amendment—Resolution of board of directors of Western Union Telegraph Co., June 5, 1867 .....	845	513
Order allowing amendment to motion for a new trial.....	848	514
Bill of exceptions.....	849	515
Order on motion to strike answer (omitted in printing) .....	850	515
Order striking certain portions of answer (omitted in printing) .....	851	516
Verdict.....(omitted in printing)..	852	516
Decree.....(omitted in printing)..	854	517
Order overruling motion for new trial (omitted in printing) .....	857	518
Order settling bill of exceptions.....	861	520
Order requesting governor to appoint judge to sit in place of Hines, J., disqualified.....(omitted in printing)..	862	521
Order of governor appointing Custer, J. (omitted in printing)..	863	521
Judgment .....	865	521
Opinion, Russell, C. J.....	866	522
Dissenting opinion, Custer, J.....	879	529
Petition for rehearing.....	893	537
Amendment to petition for rehearing.....	912	549
Notice by W. U. Tel. Co. to the court that judgment is invalid, etc. ....	915	550
Clerk's certificate.....(omitted in printing)..	916	551
Statement of points to be relied upon and designation of parts of record to be printed.....	917	551



[fols. 1-4]

**SUPREME COURT OF GEORGIA**

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,

vs.

STATE OF GEORGIA, as Owner of Western & Atlantic Railroad, and  
Nashville, Chattanooga & St. Louis Railway, as Lessees Operating  
said Railroad Under the Corporate Name and Style of Western &  
Atlantic Railroad, Defendants in Error

PETITION FOR WRIT OF ERROR—Filed Nov. 22, 1923

To the Honorable Richard B. Russell, Chief Justice of the Supreme  
Court of Georgia:

Now comes the Western Union Telegraph Company, Plaintiff in  
Error in the above cause, and respectfully shows:

The above named defendants in error filed in the Superior Court  
of Fulton County, Georgia, an equitable petition to remove the West-  
ern Union Telegraph Company and its lines of telegraph from the  
right of way of the Western & Atlantic Railroad and to obtain for  
the State of Georgia, and its lessee under the Georgia Act of Novem-  
ber 30, 1915, and its amendments, possession of the easements and  
interest in land now occupied and possessed by the Western Union.

A judgment was rendered in favor of these defendants against  
your petitioner. A new trial was refused your petitioner.

The final decree of the Superior Court in said cause, and its judg-  
ment overruling your petitioner's motion for a new trial, were af-  
firmed by the Supreme Court of Georgia September 13, 1923, by a  
divided court. Your petitioner applied for a rehearing which was  
considered and denied by said Supreme Court September 29, 1923.

In said cause there is drawn in question the validity of a statute of,  
or an authority exercised under, the State of Georgia on the ground  
of its being repugnant to the Constitution or laws of the United States  
and the decision is in favor of their validity.

In said cause, right, title, privilege or immunity is claimed under  
[fol. 5] the Constitution or statute of the United States, and the de-  
cision is against the title, right, privilege or immunity specially set  
up or claimed.

Said suit involves the validity of a contract wherein it is claimed  
that a change in the rule of law or construction of statutes by the  
highest court of Georgia would be, and is, repugnant to the Consti-  
tution of the United States.

The Georgia Act of November 30, 1915, and the amendments  
thereto, plead in the petition and upon which the suit is based; the  
action of Georgia, through its Western & Atlantic Railroad Commis-  
sion; and Georgia's lease of the Western & Atlantic Railroad;

(a) Impair contracts previously made by the State of Georgia with  
the predecessors in title of the Western Union Telegraph Company,



and made directly with the Western Union Telegraph Company, contrary to the Constitution of the United States;

(b) Take from the Western Union Telegraph Company rights and title to property, which under the law of Georgia have become fully vested in the Western Union Telegraph Company, and deprives the Western Union Telegraph Company of property without due process of law contrary to the Constitution of the United States.

The decision of the Supreme Court in this cause changes the rule of construction applicable to the statutory contract of Georgia with the predecessor in title of the Western Union Telegraph Company, to wit, the charter act of January 27, 1852, of the Augusta, Atlanta & Nashville Magnetic Telegraph Company.

The petitioner now applies for a writ of error from the Supreme Court of the United States to the Supreme Court of Georgia, the highest court of that State, that the final decision of the Supreme Court of Georgia may be examined and reversed.

The errors upon which the Western Union Telegraph Company claims to be entitled to a writ of error are those above indicated and more fully set out in the assignment of error filed herewith, and appear from the following:

### The Petition

The petition of the above named defendants in said suit in Fulton Superior Court, alleges:

I. "The State of Georgia is the sole and exclusive owner of the [fol. 6] Western & Atlantic Railroad—together with its rights of way and properties extending from" Atlanta to Chattanooga. "The Western & Atlantic Railroad was constructed as a great public work—solely out of public funds. All of the property appertaining to said railroad including its right of way and said terminals is exclusively owned by the State of Georgia directly and immediately in its sovereign and governmental capacity. The said railroad has never been incorporated, nor has it any capital stock, nor does it constitute a legal entity. It is public property, and the income derived therefrom constitutes a part of the public revenue, and is, under the laws of Georgia devoted to public uses."

II. "The Nashville, Chattanooga & St. Louis Railway operates the Western & Atlantic Railroad under a lease from the State of Georgia, as hereinafter specied, under the corporate name of the Western & Atlantic Railroad."

III. The Western Union Telegraph Company is engaged in the telegraph business in the counties through which the Western & Atlantic Railroad runs.

IV. "The said Western & Atlantic Railroad was—operated directly by the State through its legislative and executive department—until the 27th day of December, 1870, when said railroad was leased

to and operated by a private corporation known as the Western & Atlantic Railroad Company for twenty (20) years." Upon the expiration of that lease in 1870, "the said Western & Atlantic Railroad together with its rights, ways and properties was leased to the Nashville, Chattanooga & St. Louis Railway," which became a Georgia corporation under the name of Western & Atlantic Railroad Company, for a term of twenty-nine (29) years.

V. "Under and pursuant to an Act of the General Assembly of Georgia, approved November 30th, 1915, and amendments thereto, providing for the lease or other disposition of the Western & Atlantic Railroad, the said Western & Atlantic Railroad was again leased to [fol. 7] the said Nashville, Chattanooga & St. Louis Railroad for a term of 50 years beginning December 27th, 1919, as evidenced by a certain contract of lease dated May 11, 1917."

VI. "The Western Union Telegraph Company is maintaining and operating over, upon and along the right of way of the Western & Atlantic Railroad between Atlanta and Chattanooga telegraph lines, poles, wires and other appurtenances employed by it in the conduct of its telegraph business. Said uses and occupation of said right of way is without authority from the State of Georgia, and is contrary to the will and consent of the Nashville, Chattanooga & St. Louis Railway, as lessee of the Western & Atlantic Railroad, and the same constitutes an unlawful encroachment upon said right of way and an adverse use thereof."

VII. "The continued use of said right of way of the Western & Atlantic Railroad by Western Union Telegraph Company is in derogation of the State's right and title thereto, and operates adversely to the rights and interests of the lessee, the Nashville, Chattanooga & St. Louis Railway, in the full use and enjoyment of said right of way, and said use and occupation being without warrant in law constitutes a continuing trespass and a constantly recurring grievance."

VIII. Georgia Act of 1915. Western & Atlantic Railroad Commission. Georgia's Lease.—"The General Assembly of Georgia adopted an act approved November 30, 1915, creating the Western & Atlantic Railroad Commission for the purposes and with the powers and duties therein expressed; and by an amendment of said act approved August 4th, 1916, the said Western & Atlantic Railroad Commission was given full power and authority in its discretion to deal with and dispose of any and all encroachments upon, and uses and occupancies of, any part of the right of way and properties of the Western & Atlantic Railroad, whether such use or occupancy be permissive or adverse, and whether with or without claim of right therefor; and the Commission was further authorized and fully empowered to take such action as it might deem proper and expedient to cause [fol. 8] the removal and discontinuance of any such use or occupancy, and to this end it was authorized and empowered to institute and prosecute in the name and behalf of the State of Georgia such suits or other legal proceedings as it may deem appropriate in protection of the State's interest, or the assertion of the State's title.

"Paragraph fourteen of said lease contract of date May 11, 1917, expressly reserves to the State of Georgia the right to remove and cause to be discontinued any or all encroachments and other adverse uses and occupancies in and upon the right of way or other properties of the Western & Atlantic Railroad, or any part thereof, whether maintained under claim of right or otherwise, and to this end the Nashville, Chattanooga & St. Louis Railway, as lessee, consented that the State may withhold delivery of possession, or right of possession, of such parts of the right of way and other properties as may be so adversely used and occupied until such encroachments and other adverse uses and occupancies shall have been removed or discontinued; and that the State of Georgia may, at its option, and in such manner as it may deem best, proceed to remove such encroachments, uses and occupancies, acting therein in its own name and behalf as the owner of the property; it being further understood and agreed that the Nashville, Chattanooga & St. Louis Railway, if and when so requested, shall join with the State and become a party to any such proceeding, judicial or otherwise."

"Pursuant to the authority and direction of said act, and in accordance with paragraph fourteen of said lease contract, the said Western & Atlantic Railroad Commission at a meeting held on the 27th day of December, 1919, adopted a resolution authorizing and directing the counsel for the Commission, William A. Wimbish, to institute and prosecute in the name and behalf of the State of Georgia, such suits and legal proceedings as may be appropriate for the removal of said encroachments and the discontinuance of such adverse use by the Western Union Telegraph Company, and providing that the Nashville, Chattanooga & St. Louis Railway, as lessee of the Western & Atlantic Railroad, shall join in such suits and proceedings."

"In accordance with such authority and direction from the Western & Atlantic Railroad Commission this suit is brought, and the Nashville, Chattanooga & St. Louis Railway, as lessee of the Western & Atlantic Railroad, joins herein as a party complainant."

[fol. 9] Thereupon the petition, invoking equity, prays:

First. "Judgment and decree declaring the defendant, the Western Union Telegraph Company, to be without lawful right or authority to use and occupy any portion of the right of way of the Western Atlantic Railroad as and for the purpose hereinabove described, or any purpose whatever; and commanding the Western Union Telegraph Company to forthwith cease and wholly desist from the said use and occupation to the end that the petitioners, the State of Georgia, and its lessee, the Nashville, Chattanooga & St. Louis Railway, may have and enjoy the full and unrestricted use and enjoyment of said right of way, free of any adverse claim or right thereto on the part of the Western Union Telegraph Company."

Second. "That the Western Union Telegraph Company, its officers, servants and agents severally and collectively, be perpetually enjoined from the use and occupancy of any part of the said right of way of the Western & Atlantic Railroad for the conduct of its

business or the maintenance of any poles, wires, or structures employed in connection therewith, and from entry upon or the commission of any act of trespass on said right of way incident to or in connection with the operation and conduct of its business; and from in any wise disturbing or interfering with the free and unrestricted possession and use of said right of way by or in behalf of the State of Georgia, and its lessee, the Nashville, Chattanooga & St. Louis Railway."

Third. That the injunction prayed be granted upon equitable terms "with respect to the removal by said Western Union Telegraph Company of its wires, poles, structures and appurtenances from said right of way within such reasonable time as may be limited by the court, and to the extent that this may be done without undue delay."

Fourth. General relief is prayed.

#### The Answer

The following is a brief outline of the answer:

1. The construction of the Western & Atlantic Railroad as a "railroad communication" from Atlanta to Chattanooga under the Georgia Act of December 21, 1836, and the acts amendatory thereof is admitted.

[fol. 10] The Western & Atlantic Railroad was constructed out of the public funds, but for lack of sufficient information it is neither admitted nor denied that it was constructed solely out of public funds, the said Georgia Act provided for the sale and disposition of stock for the purpose of procuring necessary funds. For the want of sufficient information it is neither admitted nor denied what stock, if any, was issued, or what funds were raised thereby, or the rights of persons holding such stock.

The Georgia Statute under which that Railroad was constructed "authorized the acquirement by the State of Georgia of such rights of way in, through and over lands as might be necessary for the construction and operation of that railroad. Pursuant to that authority defendant believes that the State of Georgia did acquire, and now possesses, such easements or rights of way in, through and over lands upon which that railroad is now constructed as is necessary for the construction, maintenance and operation thereof, and that all or nearly all of such easements and rights of way will revert to the original land owners upon the discontinuance of said railroad and the operation thereof. Upon information and belief this defendant denies that the State of Georgia is the owner in fee simple of any of the land in, through, over and upon which the Western & Atlantic Railroad is constructed and operated, commonly known as the right of way of the Western & Atlantic Railroad.

"Defendant admits that the State of Georgia is the owner of said Western & Atlantic Railroad and that of said easements or rights of way therefor, but expressly denies that either the lines of telegraph of defendant upon, along or over said right of way, or the land taken

therefor or the easements and rights of way in said land necessary for the construction, reconstruction, maintenance and operation thereof, belong to the State of Georgia; but on the contrary defendant alleges that said lines of telegraph hereinafter more particularly described, and the land taken therefor and said easements necessary therefor, are, and continuously for a long period of time have been, in the exclusive and adverse possession of the Western Union Telegraph Company, which is the sole owner in fee simple thereof.

"Defendant denies that the said Western Atlantic Railroad, including its right of way and terminals, is owned by the State of Georgia in its sovereign or governmental capacity. On the contrary [fol. 11] this defendant alleges that the State of Georgia embarked, pursuant to said statutes of Georgia, in the construction, maintenance and operation of a railroad, an enterprise usually carried on by individual persons or companies, and in so doing it waived, and has always waived, its sovereign character in respect to the ownership, construction, maintenance and operation of said railroad, and in respect to relations brought about or existing between itself as the owner, constructor, maintainer and operator of said railroad, on the one hand, and the public and third persons, on the other hand, and particularly in respect to this defendant and its predecessors in title owning, possessing, constructing, maintaining and operating lines of telegraph and the easements necessary therefor upon and along said Western & Atlantic Railroad. In so embarking in the ownership and construction of, and in maintaining and operating, said Western & Atlantic Railroad either directly or through any lessee, the said State of Georgia in respect thereto became, and at all times has been, subject to the laws and regulations applicable to, and binding upon, private persons, private corporations and ordinary railroad corporations, owning, constructing, maintaining and operating a railroad; and the State of Georgia assumed all the obligations and all of the liabilities incident to such ownership and business when carried on by individuals; and this defendant and its predecessors in title acquired as against and from the State of Georgia, under grants and permits and contracts given or entered into by the State of Georgia with this defendant and its predecessors in title hereinafter alleged, and under the conduct and action or non-action of the State of Georgia, hereinafter alleged, and by adverse use and possession by defendant and its predecessors in title of said lines of telegraph and the easements necessary thereof, hereinafter alleged, the same rights and title which the Western Union Telegraph Company and its predecessors in title would have acquired and become possessed of under like grants permits and contracts made by, and under like conduct, action and non-action of private persons, private corporations and ordinary railroad companies, and by like adverse use and possession against private persons, private corporations, and ordinary railroad corporations. The Supreme Court of the State of Georgia has so adjudicated and de-[fol. 12] creed in the case of *Western & Atlantic Railroad vs. Carlton*, 28 Ga. 180, and in *Schofield vs. Georgia* (as owner of *Western & Atlantic Railroad*) 54 Ga. 635. The Supreme Court of Tennessee



has so held in *Western & Atlantic Railroad Company vs. Taylor*, 6 Heisk. 408, and in *Hutchinson vs. Western & Atlantic Railroad Company*, 6 Heisk. 634.

"Except as herein admitted the allegations of the first paragraph of the petition are denied."

II. The lease of the Nashville, Chattanooga & St. Louis Railway under the Georgia Act of November 30, 1915, is admitted; "but this defendant expressly denies that said present lessee under said lease contract or otherwise has acquired any right, title or interest whatsoever in or to the lines of telegraph now owned by the Western Union Telegraph Company, hereinafter more fully described, or in or to the easements and rights in land necessary therefor; and defendant denies that said lines of telegraph and the easements and rights in land necessary therefor are included within, or covered by, said lease-contract.

"Except as herein admitted, the allegations of the second paragraph of the petition are denied."

III. Defendant admits it is a foreign corporation for the purpose of maintaining telegraph lines throughout the United States and territories, and that it does a general telegraph business throughout the United States and with foreign countries as a public or common carrier with the right to acquire property and franchises in any state.

IV. Defendant admits that pursuant to the Georgia Act of December 21, 1836, "an engineer and superintendent were appointed, \* \* \* whose duty it was to make surveys and contracts for the construction of the Western & Atlantic Railroad, \* \* \* to contract with land-owners for rights of way, and to condemn rights of way when the same could not be acquired by agreement; \* \* \* that by an amendatory act of December 23, 1837, a Commission \* \* \* was appointed for the superintendence of the work of the railroad whose duty it was \* \* \* to procure rights of way therefor."

[fol. 13] By the Georgia act of December 22, 1843, the power and authority previously vested in the Commissioners of the Western & Atlantic Railroad and other named officers should be vested in the Governor and Chief Engineer of said Railroad.

The Georgia Act of January 15, 1852, provides for the appointment of a superintendent of the Western & Atlantic Railroad "to conduct all of the operations of the railroad connected with its construction, equipment and management," and "contract for and purchase all other things necessary for the construction, repair and equipment of the road and its general working and business \* \* \*. He shall also have power \* \* \* to settle all claims against the Western & Atlantic Railroad, and \* \* \* the claimant shall be authorized to bring suits in any of the Superior Courts \* \* \* against the superintendent \* \* \*. The judgment which may be obtained \* \* \* shall be satisfied by him from the assets of said Railroad."

The Georgia Code of 1860, paragraph 889, provides that "the State occupies the same relation to said road as owner that any company or incorporation does to its railroad, \* \* \* so far as is consistent with the sovereign attributes of this state and the laws of force for its conduct." The same Code, paragraph 895, sub-paragraphs 4, 7 and 8, distinctly authorize the superintendent of the Western & Atlantic Railroad to make such contracts as may be necessary; to settle claims against the railroad; and to sue; and subjects him to suit.

Defendant admitted that the Railroad was operated by the State through its legislative and executive departments until December 27, 1870, not in a sovereign capacity, but in the capacity of a private person, subject to the rules and laws applicable to ownership, operation, contracts, conduct, action and non-action of private persons or corporations owning and operating a railroad.

The defendant admitted the leases of the railroad in the years 1870 and 1889; denied that its lines of telegraph along said Railroad and the easements necessary therefor were then owned by the State of Georgia, or were covered by either lease, but on the contrary alleged that those lines of telegraph and the easements necessary therefor had long previously been, and then and during the entire [fol. 14] term of said leases and thereafter up to the present time, had been possessed and owned exclusively and adversely by the Western Union Telegraph Company. All allegations of the fourth paragraph not admitted are denied.

V. The lease of said railroad for fifty years from December 27, 1919 is admitted; but the defendant denies that the lines of telegraph along said railroad and the easements necessary therefor were then owned by the State of Georgia or were covered by said lease, but on the contrary had long previously been, and then and to the present time have been, possessed and owned exclusively and adversely by the Western Union Telegraph Company.

VI. "Defendant admits that it is maintaining and operating over, upon or along what is known as the right of way of the Western & Atlantic Railroad between the City of Atlanta, Georgia, and the City of Chattanooga, Tennessee, telegraph lines, poles, wires and other appurtenances owned, possessed and employed by it in the conduct of its telegraph business, and it has continuously so owned, possessed, maintained and operated the same, together with the easements and interest in land necessary therefor, from the time of its acquisition thereof on or about the 12th day of June, 1866, to the present time, and prior thereto its predecessors in title so owned, possessed, maintained and operated the same from the date of first construction about the year 1850 as hereinafter set forth; the said telegraph lines, poles, wires and appurtenances and the easements necessary therefor were at all times aforesaid continuously and adversely owned, possessed, used and occupied by defendant and its predecessors in title."

The answer then describes in detail the telegraph lines of the Western Union Telegraph Company and its easements therefor along the Western & Atlantic Railroad.

"Defendant denies that the use and occupation of said right of way and the possession and enjoyment of the easements and interest in land above described necessary for the construction, reconstruction, maintenance and operation of said lines of telegraph is without authority from the State of Georgia. This defendant further denies that the same constitutes an unlawful encroachment upon the right of way of the Western & Atlantic Railroad. On the contrary, defendant alleges that the State of Georgia has given and granted to this defendant, and its predecessors in title under and through whom defendant claims, full power and authority to construct, reconstruct, maintain and operate in perpetuity said lines of telegraph upon, along in, over and through said right of way; and the State of Georgia has granted and given to this defendant, and also to its predecessors in title under and through whom defendant claims the easements and interest in said right of way and land above described necessary and useful for the construction, reconstruction, maintenance and operation in perpetuity of said lines of telegraph.

#### Grants from Georgia to Defendant's Predecessors

"The permits and grants aforesaid from the State of Georgia to the predecessors in title of this defendant, the conveyances from such predecessors in title under which this defendant claims to be possessed of such easements, and the grants and permits from the State of Georgia to this defendant itself, are

(1) The Georgia Act of December 29, 1847, granting any telegraph company the right to construct telegraph lines upon any public road or highway in Georgia. A copy is attached as exhibit 1.

(3) A written contract between Garst & Bean and W. L. Mitchell, Chief Engineer of the Western & Atlantic Railroad, granting to the former in aid of the construction of a telegraph line by the Augusta, Atlanta & Nashville Magnetic Telegraph Company perpetual right of way along the Western & Atlantic Railroad from Atlanta to Chattanooga. A copy of this contract and of the report thereon by the chief engineer, as set forth in the original answer and an amendment, is attached as exhibit 2.

The Georgia Act of January 27, 1852, ratifying in section 6 thereof the contract between Mitchell, Chief Engineer, and Garst & Bean, and granting in section 9 thereof a perpetual easement to the Augusta, Atlanta & Nashville Magnetic Telegraph Company for its telegraph lines along and across any high road or high roads "and any railroad which now or may hereafter belong to this State." A [fol. 16] copy of the material parts of this act are attached as exhibit 3.

The construction and operation under this contract and statute of telegraph lines along the Western & Atlantic Railroad is alleged. The title thereto is deraigned in the answer from the original constructor and owner under this contract and statute into the several successors and assigns in title, and finally into the Western Union

Telegraph Company, the defendant; and continuous, open and adverse possession of said telegraph lines and easements is alleged in each of said owners from the date of construction about the year 1851 continuously to the present time.

"10. By a contract dated August 18th, 1870, between the Western & Atlantic Railroad and the Western Union Telegraph Company executed in behalf of the Western & Atlantic Railroad by its Superintendent and approved by the Governor of Georgia under the seal of the State, the State of Georgia granted and conveyed to the Western Union Telegraph Company a 'perpetual right of way to erect and maintain telegraph lines along said railroad of as many wires as it may deem necessary to its business, and additional lines of poles whenever' the Western Union Telegraph Company shall so elect."

"The preamble of said contract recites that the agreement was entered into 'in order to provide necessary telegraph facilities for the party of the second part (W. & A. R. R. Co.) and to a better understanding of the terms on which the party of the first part (W. U. T. Co.) shall occupy the line of railroad of the party of the second part with the line or lines of telegraph wires belonging to the party of the first part, and to permanently settle and define the business relations between the respective parties hereto.' "

Litigation arose between the first lessee, Western & Atlantic Railroad Company with the Western Union Telegraph Company in which the former claimed that it was the owner of a wire in the line of telegraph of the Western Union Telegraph Company along that railroad, and refused to be bound by the above mentioned contract of August 18, 1870, which gave perpetual easements to the Western Union Telegraph Company and entitled it to payment for service rendered by its telegraph lines along the Western & Atlantic Railroad. The contentions of the parties resulted in a suit in the United [fol. 17] States District Court for the Northern District of Georgia in the year 1872, in which the Western Union Telegraph Company sought to collect moneys due it for its said services and to restrain the Western & Atlantic Railroad from interfering with its telegraph lines. The case went to the Supreme Court of the United States (91 U. S. 283) which upheld the contentions of the Western Union Telegraph Company, and thereafter the Western & Atlantic Railroad Company paid the amount claimed by the Western Union Telegraph Company.

On October 22nd, 1887 (Georgia Laws 1887, page 911), the General Assembly of Georgia requested the Governor to instruct the Attorney General to examine the facts and circumstances connected with said contract and grant of August 18th, 1870, and, if ground existed for the rescinding of that contract, to institute a proceeding for that purpose. No such proceeding has ever been instituted.

Defendant alleges no ground existed for rescinding the contract, and claims that in any event the State is now barred by its laches and by the statutes of limitations from questioning the validity of the contract, and from instituting the present suit, or any proceed-

ing whereby or wherein the validity of that contract may be involved or questioned.

The defendant further denies that the use and occupation by it of the right of way of the Western & Atlantic Railroad is without authority from the State of Georgia or constitutes an unlawful encroachment thereon; and alleged that the same is authorized because of the facts previously stated in the answer and under the following facts:

#### Statutes of Limitation and of Laches

(11) The statute of limitation of March 6, 1856, and particularly sections I, III, XI, XII, XXXVIII, XXXIX, each of which are set forth in full in the answer.

Section XXXVIII of the Act provides "that when by the provisions of this Act a private person would be barred of his rights, the State shall be barred of her rights under the same circumstances." Section XXXIX of this Act provides "This Act shall in none of its provisions interfere with the principles established in the Court of Equity in relation to laches or stale demands, or the equitable bars in cases brought to said courts."

[fol. 18] Sections XXXVIII and XXXIX of said Act are substantially embodied in paragraphs 4369 and 4371 of the present Code of Georgia, copies of which are attached as exhibit 4.

Joint resolutions of the General Assembly of Georgia December 19, 1893 (acts 1893 page 501) and of December 18, 1894 (Acts 1894 page 283) recognized adverse possession of lands, rights and properties of the Western & Atlantic Railroad which would ripen into good title and bar the state from claim therein when under like circumstances a private person would be barred. These resolutions provide that "a settlement of each and every case of encroachment, adverse claim, occupation or right held against the interest of the State" shall be effected "in such a manner and on such terms as will be fair and equitable," and "that any judgment or decree rendered in 'finally determining any and all matters of controversy and issues, both of law and fact between the State of Georgia and any person or persons affecting or relating to the Western & Atlantic Railroad, its rights, ways and properties,' 'shall be so moulded in each case as to establish and give effect to all the rights and equities of the parties in the subject matter.'"

"The State of Georgia was authorized to extend and construct the Western & Atlantic Railroad from the northern boundary line of Georgia to \* \* \* Chattanooga, Tennessee, and to acquire such rights of way, easements and interest in land in \* \* \* Tennessee as might be necessary therefor, not in its sovereign capacity, but only in the capacity of, and only with the rights of, and subjects to all burdens and limitations imposed by law or equity upon, a private person or ordinary railroad company, and subject to all of the statutes of \* \* \* Tennessee relating to prescriptive title, to adverse possession and to limitation upon the right of suit by



legislative enactments" of Georgia and Tennessee specified in the answer.

The statutes of Tennessee in respect to adverse possession, limitation of actions and prescriptive title are set forth in the answer, and continuous adverse possession at all times is alleged.

(12) "Art. 1, Section 8 of the Constitution of the United States empowering the Congress to regulate interstate Commerce; to establish post roads and to provide for and maintaining an army and [fol. 19] navy which would include the necessary means of rapid communication, and to do all things necessary for these purposes.

#### United States Post Roads Act for Telegraph Lines

The Post Roads Act of the United States of 1837, 1853 and 1872 declaring all railroads to be post roads.

The Post Roads Act of Congress of July 24, 1866, "An Act to aid in the construction of telegraph lines and to secure to the Government to use of the same for postal, military and other purposes", grants to telegraph companies accepting its terms the right to establish their lines along the post roads, and secures to the United States right of preferential service over such lines at rates prescribed by itself, and with the right to the United States to acquire such telegraph lines when it so desires. Revised Statutes U. S. Chapter 65 paragraphs 5263-5269. Failure of an accepting telegraph company to fulfill the duties and obligations imposed by such accepted statute is severely penalized.

The Western Union Telegraph Company accepted the provisions of this statute June 8, 1867.

This statute is permissive; does not give a telegraph company the right to go upon the railroad right of way except with the concurrent assent of the Railroad Company; but when such consent has been given, as in this case, the United States thereby acquired vested rights in any perpetual easement along railroad right of way acquired by a telegraph company which can not be divested by either telegraph company or railroad company without the consent of the United States, nor can either railroad company or telegraph company do anything which would prevent the telegraph company from discharging its obligations under the Post Roads Act. Railroads being by act of Congress, under the provisions of the Constitution, declared post roads, the permit of the United States under the Post Roads Act is an increment in the title of the Western Union Telegraph Company as well as a statutory negation of the right or power of either telegraph or railroad company to surrender or destroy a perpetual easement or telegraph lines essential to the discharge and fulfillment of the duties of a telegraph company under the Post Roads Act.

#### [fol. 20] Unconstitutional Deprivation of Vested Rights

It is admitted that the use and occupation by the Western Union Telegraph Company complained of is contrary to the will of the

Nashville, Chattanooga & St. Louis Railway; but it is alleged that that corporation has no right to so object or to interfere with the Western Union Telegraph Company or its lines of telegraph; that such interference, and any Georgia statute, law, judgment or decree permitting such interference or requiring the removal of said lines of telegraph "will deprive defendant of its lawful rights and properties vested in, and secured to, it by the laws and constitutions of Georgia and of the United States" and will be unjust and inequitable to defendant not only because of the facts above alleged, but also because of the great cost of construction and of maintenance for over sixty (60) years without objection by the State of Georgia or any land owner, and because of the interest of the public and of the Government in these lines and in the service they afford.

VII. Defendant denies that the plaintiffs have any right, title or interest in, or own, or are entitled to the possession of the telegraph lines along the W. & A. R. R. and the easements necessary therefor; alleges that defendant has the exclusive right and title thereto and possession thereof; denies that its use is unlawful or a trespass; admits the use and occupation by itself and its predecessors to have been continuously adverse by the State and to all persons whomsoever from the time of first construction to date.

VIII. Georgia Act of 1915. W. & A. R. R. Commission. Georgia's Lease.—The Georgia lease act of November 30, 1915, which it is admitted created a Commission to lease; to inventory the property; to determine what property is 'not useful for railroad purposes'; 'to determine what if any, steps should be taken to assert right and title of the State to any part of the right of way or properties—adversely used and occupied'; to prepare surveys showing 'the extent and character of every use or occupation of the right of way—by any person or corporation other than the lessee, and the authority therefor'; 'to determine the properties not used or apparently not useful [fol. 21] for railroad purposes'; 'to prepare bills for presentation to the General Assembly to carry into effect any recommendation which it might make' with respect to what steps should be taken to assert the right and title of the State to any part of the right of way of any part of the road that may be adversely used or occupied; and with respect to any other recommendation which, in its opinion, and which may require legislation to the General Assembly of Georgia to fully, completely and adequately protect all the interests of the State of Georgia in regard to said road and all of its parts and properties, whether reckoned as surface, overhead or underground rights.' "

It is admitted that the amending act of August 4, 1916, contains language purporting to give the Commission powers claimed for it thereunder in paragraph VIII of the petition (page 4 above).

Defendant admits that paragraph 14 of the present lease contains a reservation of a claimed right to remove encroachments upon, and adverse uses of right of way, whether under claim of lawful right or not; contains a statement that the lessee consents to the withholding of delivery of possession or right to possession of such portions of said

property or rights of way adversely used until the discontinuance thereof; and contains a provision that in any proceeding by the State the N. C. & St. L. Ry. should become a party.

#### Resolutions of W. & A. R. R. Commission

The resolutions of the Commission under which this suit has been instituted is attached hereto as exhibit 5. This resolution shows that it was adopted upon the representation and at the request of the lessee, and that the suit would be instituted only upon the condition that the cost and expense thereof be defrayed by the lessee. It in effect declares the use and occupancy by the Western Union Telegraph Company to be without right and to be an unlawful encroachment; declares this suit "for the removal of said encroachment and the discontinuance of said use is within the purview of said Act of August 4th, 1916, and within the contemplation of paragraph 14 of the new lease contract dated May 11th, 1917; "and directs the institution of this suit for the removal of said encroachment and the discontinuance of said use: Provided, the Nashville, Chattanooga & St. Louis Railway, as such lessee, shall join in such suits and proceedings and defray the proper costs and expenses thereof without liability over against the State."

[fol. 22] Defendant denies that the Commission has the power and authority claimed; denies that the Governor and the Secretary of State who executed the present lease had power and authority to insert therein the aforesaid provisions, or to make the claims or assert the rights made in the provisions, or to contract with respect thereto, and particularly in-so-far as such provisions, claims and claimed rights apply to this defendant and its said line of telegraph and said easements.

"Defendant denies that the act of November 30th, 1915, or any amendment thereof authorizes and empowers said Commissioners therein appointed.

"To adopt said resolution, or to give the direction or authority therein set forth; or

"To take any act, or to institute this suit, or to institute any proceeding;

"To question or attack defendant's right to maintain, construct, reconstruct and operate in perpetuity its said lines of telegraph above described, or to attack defendant's right and title thereto and to the perpetual easements and rights in land necessary therefor; or

"To attack or to seek to annul or have adjudged ineffective in any way or to any extent the grants and permits given by the State of Georgia to defendant and its predecessors in title by the statutes and resolutions of the State of Georgia herein above alleged; or

"To attack or impair any right or title in or to, or possession of, said easements and rights in, on, along, through or over the right of way of the Western & Atlantic Railroad, acquired as aforesaid by defendant or its predecessors in title; or

"To remove or to interfere with defendant's said lines of telegraph and easements; or

"To prevent or defeat the performance by defendant of its obligations under, or to deprive defendant of the rights, properties and franchises acquired by it, under the said act of Congress and its amendments."

Unconstitutionality of Georgia Act of 1915 and of Action of W. & A. R. R. Commission

[fol. 23] "Defendant alleges, if the Georgia Act of November 30th, 1915, or any amendment thereto, has the force and effect and delegates the authority hereinabove denied by this defendant, but which defendant understands to be claimed for it by complainants in this suit and by said Commissioners appointed under said act, then said statute is opposed to the Constitutions of the United States and of Georgia; and in any event the said act and resolution of the Commissioners, and this suit and any judgment or decree of any court giving to said statute the force and effect herein by defendant denied to it, but claimed in this suit by said complainants, and any judgment or decree of any court upholding, giving effect to, or enforcing said resolution of said Commissioners, and any judgment or decree of any court, granting the prayers of the petition in this cause, will be violative of the Constitutions of Georgia and of the United States in that thereby:

"(a) There will be an impairment of the obligations of contracts by a statute or law passed or made subsequently which violates

"Georgia Constitution Art. 1, Sec. 3, Par. 2.

"United States Constitution Art. 1, Sec. 10, Par. 1.

"(b) The State of Georgia will have made and enforced a law revoking grants of privileges or immunities granted to defendant and its predecessors above alleged in such manner as to work injustice to defendant which violates

"Georgia Constitution Art. 1, Sec. 3, Par. 3.

"(c) The rights, privileges and immunities which as above alleged have vested in, or accrued to, defendant under and by virtue of the acts of the General Assembly of Georgia will not be held in-violate by all courts before whom they may be brought in question, which violates

"Georgia Constitution Art. 12, Sec. 1, Par. 5.

"(d) Thereby property of defendant will have been taken without due process of law which violates

"Georgia Constitution Art. 1, Sec. 1, Par. 3.

"Georgia Constitution Art. 1, Sec. 3, Par. 1.

"United States Constitution 14th Amendment."

In addition to the foregoing answer the following affirmative pleas [fol. 24] were filed, each complete only by reference to allegations in the answer.

IX. The plea of title by adverse possession.

X. The plaintiffs are barred by laches of the State of Georgia.

XI. In respect to property in the State of Tennessee plaintiffs are barred because of the statutes of limitations of the State of Tennessee.

#### Portions of Answer and Pleas Stricken

Upon motion of the plaintiffs the court struck portions of the answer and pleas; to wit:

1. The court struck from the answer the denial of the allegation in the petition that the Western & Atlantic Railroad is owned by the State of Georgia in its sovereign or governmental capacity.

The court struck the allegation in the answer that in respect to the ownership, construction and operation of the Western & Atlantic Railroad the state of Georgia waived its sovereign character and became subject to the laws applicable to, and binding upon, private persons, and its claims and rights would be barred by laches and by limitation when private persons would be barred under like conditions. (Paragraph 5, 7 and 33 of the motion to strike answer.)

2. The court struck the denial of the alleged ownership by the State of the land in or through which the alleged right of way is situate.

The court struck the allegation in the answer that the interest of the State in that land is only "right of way," as alleged in paragraph 1 of the petition; and struck the allegation in the answer that title to that land and to every interest and easement therein not impairing the State's easement for railroad purposes is in the original land owner from whom the State acquired its easement, and the heirs and assigns of that owner. (Paragraphs 3 and 4 of motion to strike answer.)

[fol. 25] 3. The court struck the statutes of Georgia plead appointing agents and officials to contract for and procure rights of way and equipment for the Western & Atlantic Railroad and to construct and superintend and operate the same; struck statutes and decisions plead stating the relation of the State thereto; and struck statutes plead giving its superintendent power to sue, and subjecting him to suit, with the provision that any judgment against him should be satisfied from the assets of that railroad. (Paragraph 6 of motion to strike answer.)

4. The court struck the denial of the allegation in the petition that telegraph lines and easements of the Western Union Telegraph Company along the Western & Atlantic Railroad belong to the State, or were covered by its plead leases of the years 1870, 1889 and 1917.

The court struck the allegation in the answer that ownership of those telegraph lines and easements was in the Western Union Telegraph Company. (Paragraphs 8, 9, 10, 11 and 38 of the motion to strike answer.)

5. The court struck the statement in the answer of the character of easements in land claimed to be owned by, and to have long been in the possession of, the Western Union Telegraph Company. (Paragraph 12 of the motion to strike answer.)

6. The court struck the denial of the allegation in the petition that use, occupancy and possession of right of way of the Western & Atlantic Railroad by the Western Union Telegraph Company is without authority from the State of Georgia and is an unlawful encroachment. (Paragraph 13 of the motion to strike answer.)

The court struck the allegation in the answer that the State had, on the contrary, granted to it and to its predecessors in title, in perpetuity, the easements now occupied and used by the Western Union Telegraph Company and its predecessors in title and particularly by the following grants:

(a) Grant by Georgia Act of December 28, 1847, "granting any company or individual the right to construct and operate lines of telegraph upon any public road or highway in the State," exhibit 1 hereto. (Paragraph 14 of motion to strike answer).

[fol. 26] (b) Contract with Garst & Bean, exhibit 2 hereto, (partially stricken). (Paragraphs 16, 17 and 18 of motion to strike answer.)

(c) The act of January 27, 1852, in-so-far as it ratified and affirmed the contract with Garst & Bean. (Exhibit 3 hereto.) (Paragraph 19 of the motion to strike answer.)

(d) The grant under the contract of August 18, 1870, page 13 above. (Paragraphs 28, 29 and 30 of the motion to strike answer.)

The contract also struck

(e) The allegation that title of the Western Union Telegraph Company to its easements along the Western & Atlantic Railroad has ripened and become fully vested in it, and that plaintiffs, by reason of laches on the part of the State of Georgia, cannot now attack that title; and struck allegations of the resolutions of the General Assembly of Georgia of October 22, 1887, of December 19, 1893, and of December 18, 1894, (pgs. 14-15 above). (Paragraphs 30, 31 and 32 of the motion to strike answer.)

(f) The allegation that title to easements in Georgia have become vested in the Western Union Telegraph Company under the Georgia statutes of limitations and prescribing title by adverse possession; and the allegation that title to easements in Tennessee has become vested in the Western Union Telegraph Company under the plead Ten-

nessee statutes of limitation, and prescribing title by adverse possession. (Paragraphs 3, 32, 33 and 34 of the motion to strike answer.)

(g) The allegation that under the facts and circumstances plead, equity will not require the removal of Western Union Telegraph lines from the right of way of the Western & Atlantic Railroad. (Paragraphs 35, 36 and 37 of the motion to strike answer.)

7. The court struck various items of title in the plead deraignment of title from Garst & Bean, and the Augusta, Atlanta & Nashville Magnetic Telegraph Company, the original grantees, into the Western Union Telegraph Company. (Paragraphs 21, 22 and 26 of the motion to strike answer.)

[fol. 27] 8. The court struck from the answer the denial that the Western & Atlantic Railroad Commission has the power claimed for it in the petition, and struck the entire denial thereof as hereinabove set forth, page 19. (Paragraphs 39, 40 and 41 of the motion to strike answer.)

Georgia and Its Lessee Claim Georgia Act of 1915 Has Effect Denied  
by Western Union Telegraph Co.

Paragraphs 39 of motion to strike the answer expressly asserts that under the act of November 30, 1915, the amendment of August 4, 1916, and the resolution of the Western & Atlantic Railroad Commission (Exhibit 5 hereto), "the power and authority of said Commission, and the Governor and Secretary of State of Georgia, respectively, which are denied by said portions of paragraph 6 of the answer, do in law exist, and were conferred by said acts of the General Assembly of Georgia and the lease contract made thereunder." (Paragraphs 39, 40 and 41 of the motion to strike answer.)

Georgia and Its Lessee Claim Georgia Act of 1915, if Given Force  
Claimed by Them and Claimed by Western Union Telegraph Company, is Constitutional

Paragraph 40 of the motion to strike the answer alleges that the exercise of the power and authority claimed to have been conferred, as stated in paragraph 39 of the motion, will not violate the Constitution of Georgia and of the United States as alleged in defendant's answer.

Paragraph 41 of the motion to strike the answer alleges that said act of November 30, 1915, is not opposed to any of the provisions of the Constitution of Georgia or of the United States and that a judgment or decree granting the prayers of the petition would not be opposed to those provisions.

9. The affirmative pleas IX, X, XI, were stricken on the ground that each plea in itself did not fully state the facts. (Paragraph 42 of motion to strike answer.)

The judgment of the court striking portions of defendant's answer allowed the defendant to amend its answer and pleas.



[fol. 28]

## Exceptions Pendente Lite

Within the time prescribed by law the Western Union Telegraph Company presented its exceptions pendente lite to the order or judgment sustaining plaintiff's motion to strike and striking portions of the answer and the pleas, which bill of exceptions was duly signed, certified and filed in Fulton Superior Court.

## Amendment to Answer and Pleas

The Western Union Telegraph Company within the time allowed amended its original answer. It admitted the existence of the Western & Atlantic Railroad extending from Atlanta to Chattanooga. It denied all other allegations of paragraph 1 of the petition.

The amendment denied the allegations of paragraph- IV and V of the petition.

Further answering paragraph VI of the petition the defendant admitted the maintenance and operation of its telegraph lines along the Western & Atlantic Railroad; denied that the easements necessary therefor is the right of way or property of the plaintiffs, or either of them; strict proof of the right and title of plaintiffs' interest in the land or right of way is required; denies that its use and occupation is without authority from the State of Georgia; admits its use is contrary to the consent of the lessee, the N. C. & St. L. Ry.; denies its use is an unlawful encroachment, but admits that its use and occupation of land and easements is adverse (paragraph XV of amendment).

Paragraph XVI amends subdivision 3 of paragraph VI of the original answer setting out more fully than in the original the contract with Garst & Bean, and the report of the Chief Engineer to the Governor of Georgia relative thereto, hereto attached as exhibit 2.

Paragraphs XVII, XVIII and XIX amends the deraignment of the defendant's title in paragraph VI of its original answer.

Upon plaintiffs' motion, paragraph 1, the court struck from paragraph XVI of the amendment the allegation that the letter of Mitchell to Garst & Bean offered the latter perpetual easements for telegraph lines.

Upon motion of plaintiffs, paragraphs 2 to 8, the court struck practically all of paragraphs XVII, XVIII and XIX of the amendment to the answer, adding to the deraignment of defendant's title previously plead.

In addition to amending its original answer the Western Union Telegraph Company filed six separate affirmative pleas in defense numbered XX to XXV, to wit:

XX. This plea affirmatively asserts defendant's title to the easements used by it and necessary for its lines of telegraph along the Western & Atlantic Railroad. It alleges the grants from the State of Georgia hereinabove specified on pages 12 to 13, deraigns its title from the first grantees into itself, and plead the contract of August

18, 1870, whereby Georgia granted it perpetual easements. (Paragraph 9 of motion to strike amended answer.)

XXI. Paragraph XXI is a separate and distinct plea of the statutes of limitations under the Georgia Act of March 6, 1856. This plea was stricken on plaintiffs' motion paragraphs 30-36.

XXII. Paragraph XXII is a separate and distinct plea setting up in bar prescriptive title to property in Georgia under the statute of that State. This plea not only asserts good title by adverse possession against the State of Georgia, but against all persons whomsoever. This plea was stricken on plaintiffs' motion, paragraphs 37-42

XXIII. Paragraph XXIII is a separate and distinct plea in bar as to Tennessee easements and right of way under the plead statutes of Tennessee. This plea was stricken on plaintiffs' motion paragraphs 43-45.

XXIV. Paragraph XXIV is a separate and distinct plea in bar because of the laches of the State of Georgia. The facts plead are substantially those hereinabove set out on pages 11 to 17. This plea was stricken on plaintiffs' motion paragraphs 46-58.

In each of the separate pleads in paragraph numbers XX, XXI, XXII, XXIII and XXIV the several grants from the State of Georgia [fol. 30] hereinabove mentioned on pages 12 to 13 are plead in support of defendant's several pleas. Each plea was stricken carrying with it the plead grants from the State of Georgia.

## XXV

Georgia Act of 1915 and Action of Georgia's W. & A. R. R. Commission are Unconstitutional

Paragraph XXV of the amendment is a separate and distinct plea alleging that the Act of November 30, 1915, the amendment thereto, the resolution of the Commission (attached hereto as exhibit 5) and any judgment or decree giving that statute the force claimed in the petition or upholding and enforcing said resolution of said Commission and any judgment granting the prayers of the petition, will violate the Constitutions of Georgia and of the United States in impairing the obligations of contracts (being those mentioned on pages 12 to 13 above), and property will be taken from the Western Union Telegraph Company without due process of law in violation of the Constitution of the United States Art. 1, Sec. 10, Par. 1, and the 14th amendment thereto. This plea is substantially as set forth in the original answer page 20 above. In addition it specifies the particular contracts which it claims will be impaired, to wit:

1. The Georgia Act of December 29, 1847.
2. The contract with Garst & Bean of October 11, 1850.
3. The Georgia Act of January 27, 1852.

#### 4. The contract of August 18, 1870.

These contracts are more fully referred to on pages 12 to 13 above. This plea was stricken on plaintiffs' motion paragraph 59, to wit:

"59. Plaintiffs move to have stricken paragraph XXV of said amendments, because: (1) Neither the Act of November 30th, 1915, nor the resolutions of the Western & Atlantic Railroad Commission, copy of which is attached to the original answer of defendant, nor any judgment or decree of this Court giving to the said statute the force and effect claimed by plaintiffs in this suit, nor any judgment or decree upholding, giving the effect to or enforcing said resolution or granting the prayers of the petition, would be violative of the Constitution of Georgia or of the United States, as claimed by defendant. (2) The same allegations were made in the original answer of defendant and were stricken therefrom, on motion of plaintiffs, by order of this Court heretofore passed, still existing and unreserved."

[fol. 31]

#### Exceptions Pendente Lite

Within the time prescribed by law the Western Union Telegraph Company presented its exceptions pendente lite to the order or judgment sustaining plaintiffs' motion to strike, and striking portions of the amendment to defendant's answer, and striking all of the affirmative pleas numbered XX, XXI, XXII, XXIII, XXIV and XXV, which bill of exceptions was duly signed, certified and filed in Fulton Superior Court.

#### Some Material Testimony Admitted and Excluded

Plaintiffs introduced in evidence the statute of Georgia authorizing the construction of the Western & Atlantic Railroad; authorizing the acquisition by the State of Georgia of such right of way as might be necessary therefor, with authority to acquire right of way by condemnation where it could not be procured by contract. The Georgia Statutes introduced in evidence also require the officers charged with the work to act as economically as possible.

Hunter MacDonald, a witness for the plaintiffs, testified that in 1879 he entered the service of the Nashville, Chattanooga & St. Louis Railway; in 1891 he moved to Atlanta and took charge of the Western & Atlantic Railroad as resident engineer and ever since 1892 has been chief engineer of the N. C. & St. L. Ry.; that he had been connected with the operation of the Western & Atlantic Railroad continuously for about 40 years in one capacity or another, and that during part of that time he was in charge of its maintenance of right of way. He also testified that he understood that there are deeds conveying to the State of Georgia a very large part of the right of way of the Western & Atlantic Railroad; that these deeds "give right of way over, or through certain land lots"; that he found it difficult to determine the land mentioned in these right of way deeds. The witness also testified "from my knowledge of such examination

of deeds as I did make I am unable to say whether there are deeds conveying the right of way for the entire length of the line, or whether there are portions of the right of way to which there are no deeds, but which are possessed and held simply by possession."

In addition to the foregoing testimony which the court allowed to go to the jury, the following testimony of MacDonald about these deeds was ruled out:

[fol. 32] "There are deeds that give right of way for the Western & Atlantic Railroad over or through certain land lots; that is nearly all give right of way through my lands in certain land lots, generally calling for a width of 33 feet on each side for railroad purposes. The general character of those deeds is that the landlord generally gives a right of way through his land for 33 feet on each side of the railroad." (Paragraph 11 of motion for new trial.)

Notwithstanding the foregoing testimony plaintiffs did not offer to introduce a single deed to right of way or land to show title in the State of land or easements to, or to define the character or extent of, claimed interest in land.

The same witness, Hunter MacDonald, also testified "In the year 1870, I should regard a telegraph line along the right of way of a railroad as being indispensable to the successful and expeditious handling of trains. It became an absolute necessity as soon as the telegraph was invented and found practicable. \* \* \* As soon as the applicability of a telegraph line became apparent for operating trains successfully, it was then recognized as a necessity. \* \* \* Prior to 1880, the telegraph line was necessary to the expeditious and safe operation of a railroad. \* \* \* Telegraph lines along a railroad and between stations of that railroad do give facilities to the railroad to communicate over those lines from station to station as to the movement of trains, and is of great benefit in avoiding dangers and disaster. \* \* \* And the use of these telegraph lines connecting those stations does greatly safeguard both life and property, and prevents many wrecks and the killing of many people."

The report of Mitchell, Chief Engineer, to the Governor of Georgia (exhibit 2 hereto) shows the urgent necessity in the year 1850 for a telegraph line along the Western & Atlantic Railroad, and the construction of half that line at the time the report was made at very little cost. This report further states "we expect the line to be in working order as far as Chattanooga in a month or two more, when we expect to be able to infuse additional efficiency in the management and render the anxiety felt for the tardy trains less painful."

The defendant proved by Stephens that its present line of telegraph was situate and in operation where it now is from 1857 to [fol. 33] date, and by Terrell from 1859 to date.

The court, on plaintiffs' motion, refused to permit defendant to introduce in evidence a certified copy of the record of a suit of Enoch R. Mills against the Augusta, Atlanta & Nashville Magnetic Telegraph Company filed in Fulton Superior Court in the year 1853

with the return of service upon the defendant in the same year, pleas filed by the defendant, verdict, judgment and execution against the defendant rendered in the year 1858; and also refused to permit defendant to introduce in evidence the record of a suit by Alfred M. Coffin against the Augusta, Atlanta & Nashville Magnetic Telegraph Company filed in Fulton Superior Court in the year 1860 with a return of service on the defendant, and the entrance of an appearance in that cause by the defendant, and its consent to the transfer of the case to an appeal. The defendant stated that it desired to introduce in evidence the record of said two suits to prove the actual existence of the Augusta, Atlanta & Nashville Magnetic Telegraph Company from which the acceptance by it of the charter granted it by the State of Georgia by its incorporating statute of January 27, 1852, would be presumed.

Defendant introduced in evidence the Garst & Bean contract and the report of Engineer Mitchell (exhibit 2 hereto), and the act of January 27, 1852, incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company (exhibit 3 hereto).

The court refused to permit the defendant to introduce in evidence deeds and proof of the transition of the title of Garst & Bean and of the Augusta, Atlanta & Nashville Magnetic Telegraph Company into itself.

The court refused to permit the defendant to introduce in evidence its contract with the State of August 18, 1870, by which the State granted an easement in perpetuity to the Western Union Telegraph Company. The court also refused to permit the defendant to introduce in evidence the resolutions of the General Assembly of the State of Georgia of October 22, 1887, of December 19, 1893, and of December 18, 1894 (pg. 14-15 above) and Stephens' testimony (motion for new trial paragraph 67), and refused to permit defendant to introduce in evidence the act of 1847 authorizing the construction of telegraph lines on highways. (Exhibit 1 hereto.)

[fol. 34] The trial judge declined to give in charge to the jury any of the requests presented by defendant including a charge that the burden of proof is on the plaintiffs; that upon the proof of outstanding title from the State to the Augusta, Atlanta & Nashville Magnetic Telegraph Company the plaintiffs cannot recover, even though defendant does not connect itself with that title; from long continued possession by defendant the law presumes a grant from its predecessors in title; this presumption applies against the State of Georgia in this case even if as plaintiffs in this cause, or as the owner of the Western & Atlantic Railroad, it is a sovereign with only sovereign attributes.

### The Verdict

The judge submitted to the jury eight special issues, the answer to which constituted the verdict. The jury found:

1. (By direction of the Court:) The State of Georgia is the sole and exclusive owner of the right of way of the Western & Atlantic

Railroad from Atlanta, Georgia, to Chattanooga, Tennessee, in its sovereign and governmental capacity.

2. (By direction of the Court:) The Nashville, Chattanooga & St. Louis Railway, is the lessee from the State of Georgia of the Western & Atlantic Railroad and its right of way, operating said railroad under the corporate name of the Western & Atlantic Railroad under lease to the Nashville, Chattanooga & St. Louis Railway from the State of Georgia under contract lease dated May 11, 1917, under the Act of the General Assembly of Georgia approved November 30, 1915, and the amendments thereto.

3. The Western Union Telegraph Company is maintaining and operating over and upon and along the right of way of the Western & Atlantic Railroad between Atlanta, Georgia, and Chattanooga, Tennessee, telegraph lines, poles and wires.

4. The maintenance, operation and occupation by the Western Union Telegraph Company is substantially as described in paragraph 6 of the original answer of the Western Union Telegraph Company with certain specified exceptions.

5. The use and occupation is without authority from the State of Georgia, is contrary to the will and consent of the Nashville [fol. 35] Chattanooga & St. Louis Railway, as lessee of the Western & Atlantic Railroad and constitutes an unlawful encroachment on said right of way and an adverse use thereof.

6. (By direction of the Court:) This suit is instituted and prosecuted in the name of the State of Georgia and in its behalf under the Act of the General Assembly of the State of Georgia of November 30, 1915, and amendments thereof, and the provisions of said contract of lease of May 11, 1917, by virtue of authority and direction of the Western & Atlantic Railroad Commission and is joined in by the Nashville, Chattanooga & St. Louis Railway as such lessee.

7. The Western Union Telegraph Company is occupying the right of way of the Western & Atlantic Railroad without the authority of the State of Georgia and without the consent of its lessee.

8. Twelve months from date is a reasonable time to allow the defendant for its removal of its telegraph lines from the right of way of the Western & Atlantic Railroad.

### The Decree

Thereupon a decree was rendered which referred to the verdict and made the same the decree of the court as if set forth in the decree. The decree further found that the Western Union Telegraph Company is without lawful right or authority to use or occupy any portion of the right of way of the Western & Atlantic Railroad; commanded a cessation of such use and occupancy; and directed the removal of the telegraph lines from said right of way within twelve months from June 5, 1922. The defendant, its officers, servants and

agents, were by the decree perpetually enjoined from such use and occupancy from and after twelve months from June 5, 1922, by which time defendant was commanded to remove its telegraph lines from said right of way.

A motion for new trial was made and filed. An order thereon was rendered superseding the judgment. The motion was amended, and a brief of evidence and the charge of court were filed. The motion for new trial was overruled. Exceptions pendente lite were duly signed and filed to the final decree. A direct bill of exceptions to the Supreme Court of Georgia was sued out and signed. Error was assigned upon defendant's bill of exceptions pendente lite to the judgment of the court rendered on plaintiffs' motion to strike from [fol. 36] defendant's original answer and pleas; upon defendant's bill of exceptions pendente lite rendered upon plaintiffs' motion to strike portions of defendant's amended answer and pleas; upon defendant's bill of exceptions pendente lite to the final decree of the trial court; and upon the order and judgment of the trial court overruling defendant's motion for a new trial.

#### Final Judgment of Supreme Court of Georgia

On September 13, 1923, the Supreme Court of Georgia rendered the following final decision in the cause, to wit, "Western Union Telegraph Co. v. State of Georgia et al.:"

"This case came before this court upon a writ of error from the Superior Court of Fulton County; and, after argument had, the case being for consideration by a full bench of six justices, after consideration, (and though there is no disagreement as to many points presented for decision) three Justices, to wit, Russell, C. J., Hill and Gilbert, J.J., are of the opinion that the judgment of the court below should be affirmed, and three Justices, to wit, Beck, P. J., Atkinson, J., and Custer, J., (who was designated by the Governor and presided in place of Hines, J., disqualified), are of the opinion that the judgment of the court below should be reversed, and therefore the judgment of the lower court stands affirmed by operation of law."

#### Conflicting Opinions of Justices of Supreme Court of Georgia

Chief Justice Russell in the opinion rendered by him said, "I freely concede that there were quite a number of errors in the conduct of [fol. 37] the trial but none of them affected or could have affected the result reached in the case, and in my opinion, no other result could have been attained either as a matter of reason or of law."

The decision rendered by the Chief Justice and the two associate justices concurring with them held:

"In this action the plaintiffs must recover upon the strength of its title and not upon the weakness of the title of the Western Union Telegraph Company," but

"Of the fact that the State of Georgia is the owner of the Western & Atlantic Railroad, the lower court could properly take cognizance, and no proof was required to establish the State's ownership."



"Therefore, upon the reading of the petition the plaintiff would have cast the burden upon the defendant to establish the validity of its claim of right or title;" and

"Therefore the question is still further narrowed to the single question as to whether the defendant in this cause carried the burden of establishing its right to occupy any portion of the right of way of the Western & Atlantic Railroad."

[fol. 38] "There was a failure on the part of the defendant in the court below, \* \* \* to establish \* \* \* that it was the owner of any interest whatsoever in the right of way of the Western & Atlantic Railroad, either by grant, prescription or otherwise, and \* \* \* for that reason any error committed by the court during the trial was powerless to prevent the verdict rendered by the jury and the judgment entered thereon."

"There can be no question that the State is the owner of the right of way of the Western & Atlantic Railroad and has been its owner since the first beginning of the undertaking."

"It is immaterial whether the ownership is in fee or only an easement."

"Even if \* \* \* the State only acquired an easement for its right of way it must be held that no right, interest, or enjoyment of even what the plaintiff in error admits is owned by the State has ever been lawfully granted by the State to anyone."

The opinion of Judge Russell also holds that the State of Georgia in its sovereign capacity is the owner of the Western & Atlantic Railroad both in the State of Georgia and in the State of Tennessee. After stating a reason the decision said "and for this reason we reject the argument that the case cited from several jurisdictions to sustain the proposition that the building and operation of the Western & Atlantic Railroad altered the status of Georgia as a sovereign State and reduced her in the same position in regard to this enterprise as she would have occupied as an individual."

Paragraph 1 of the original answer cited *Western & Atlantic Railroad vs. Carlton*, 28 Ga. 180 and *Schofield vs. Georgia*, 54 Ga. 635, and *Western & Atlantic Railroad Co. vs. Taylor*, 6 Heisk. Tenn. 408 and *Hutchinson vs. Western & Atlantic Railroad*, 6 Heisk. 634. The last two decisions are by the Supreme Court of Tennessee.

The reference by Chief Justice Russell to the cases cited as opposing the view entertained by him necessarily includes the four cases just named cited in paragraph 1 of the original answer.

The Chief Justice said that the verdict was demanded by the evidence for the reason that the case is controlled by two propositions under which the jury could not have found otherwise than they did, and for that reason the merits of all remaining assignments [fol. 39] of error are irrelevant and immaterial. The two propositions controlling the case under the opinion of the Chief Justice are:

1. The act incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company by section 6 thereof neither ratified the contract between the State of Georgia and Garst & Bean of 1850, nor by section 9 did it grant to that corporation easements.



Section 6 of the act is expressly referred to. Section 9 appears to be referred to by the following language, "in the Act of 1852 \* \* \* there is included \* \* \* a provision that the State of Georgia is granting a definite right of way or easements which shall incumber its right of way for all time."

Judge Russell held that the title of the act was neither broad enough to cover a provision therein ratifying the Garst & Bean contract, (section 6), or granting right of way (section 9), and that these sections are unconstitutional and void because of the following provision of the Georgia Constitution then in force, to wit: "Nor shall any law or ordinance be passed containing any matter different from what is expressed in the title thereof."

In holding section 6 and section 9 of the act void, Judge Russell disposed of the first proposition controlling, in his opinion, the case.

2. The second proposition controlling the case in the opinion of Justice Russell is that no prescriptive title ran against the State except from the time of the adoption of the Georgia Act of March 6, 1856. Under that Act the statute of limitations ran against the State of Georgia. The Georgia Code of 1861 which did not go into effect until January 1, 1863, supplanted the statute of limitations by the statute of title by adverse possession,—the same creature under another name.

The provisions of this Code relating to title by adverse possession do not specifically apply to the State. The third paragraph of Judge Russell's decision is a finding that between 1857 and 1861 the necessary length of time had not run to bar the State, and that after the Code of 1861 became operative title by adverse possession can not be acquired against the State. This decision is broad enough to apply both to land in Tennessee and in Georgia, and is an adjudication that plead statutes of limitation and of prescriptive [fol. 40] title of the State of Tennessee are inapplicable to, and not operative against, the State of Georgia as the owner or claimant of lands in the State of Tennessee.

The decision of Justice Custer and of Presiding Justice Beck and of Associate Justice Atkinson holds that if the contract between Mitchell, Chief Engineer of the Western & Atlantic Railroad and Garst & Bean, of October 11, 1850, "was a binding contract upon the State, then the right to use the right of way of the Western & Atlantic Railroad was conveyed and granted to the Telegraph Company. \* \* \* The controlling question in passing upon the court's ruling upon the pleadings in this case is, whether that contract was executed in such a way as to make it binding upon the State and the other parties thereto."

After stating this contract the court said that if Mitchell had the authority to make the contract an easement was thereby granted to the Telegraph Company for which Garst & Bean was acting. If Mitchell was without authority, if it "was afterwards approved and duly ratified by the General Assembly of the State \* \* \* then the contract became binding upon the State." The decision refers specifically to section 6 of the act, holds that that section does not violate the Georgia Constitution and is valid. The decision said

"This section of the Act is an approval and complete ratification of the contract entered into between Mitchell and Garst & Bean, and \* \* \* had the effect of granting to the Telegraph Company the franchise which permitted it to maintain and operate a telegraph line over the right of way of the Western & Atlantic Railroad."

This decision cited and followed the unanimous decision of a full bench of the Supreme Court of Georgia in *Goldsmith vs. Rome Railroad Company*, 62 Ga. 473, which cited and followed a number of earlier decisions of the Supreme Court of Georgia by a full bench, including particularly *Davis vs. Bank of Fulton*, 31 Ga. 69. The decision of Justice Custer, after citing the decision of *Goldsmith vs. Rome Railroad Company* in 62 Georgia says: "It covers and adjudicates in principle the question which we are called upon here to decide."

[fol. 41]

#### Petition for Rehearing

Within the time allowed by law the Western Union Telegraph Company filed its petition in the Supreme Court of Georgia and prayed for a rehearing of the cause upon the following grounds:

1. The decision of the Chief Justice concurred in by Justices Hill and Gilbert, holding sections 6 and 9 of the Act to incorporate the Augusta, Atlanta & Nashville Magnetic Telegraph Company are unconstitutional because containing matter different from that expressed in the title, does not cite, and apparently overlooks, former unanimous decisions of the Supreme Court of Georgia rendered by a full bench, and under which sections 6 and 9 of the Act of January 27, 1852 would be held constitutional and valid, to wit:

*Goldsmith vs. Rome R. R. Company*, 62 Ga. 473.

*Goldsmith vs. S. & A. R. R. Co.* 62 Ga. 468.

*Bonner vs. Milledgeville Ry. Co.* 123 Ga. 115.

*Davis vs. Bank of Fulton*, 31 Ga. 69.

And the Chief Justice and the two justices concurring with him overlooked the provision of Article 7 of the Constitution of Georgia embodied in Georgia Code paragraph 6207, to wit:

"A decision rendered by the Supreme Court prior to the first day of January 1897, and concurred in by three judges, or justices, cannot be reversed or materially changed except by the concurrence of at least five Justices. Unanimous decisions rendered after said date by a full bench of six shall not be overruled or materially modified except with the concurrence of six justices, and then after argument had, in which the decision, by permission of the court, is expressly questioned and reviewed; and after such argument, the court in its decision shall state distinctly whether it affirms, reverses, or changes such decision."

The Chief Justice and the two Justices concurring with him have also overlooked the following decisions by a full bench holding that

decisions of the character mentioned in said constitutional provision have the force and effect of a statute until reversed or modified in the manner there provided.

Heard vs. Russell, 59 Ga. 25, 54.

Lucas vs. Lucas, 30 Ga. 191.

Fidelity Co. vs. Nesbit, 119 Ga. 316, 325.

[fol. 42] The decision of the Chief Justice and the two Justices concurring with him, in holding that the Legislature was without knowledge of section 6 of the Act of January 27, 1852, overlooks the provision of the Act of section 12 of the Act of 1836 authorizing the construction of the Western & Atlantic Railroad which requires the Chief Engineer to make quarterly reports to the Governor, who shall cause the same to be printed and furnished for the information of the public; the amending Act of 1837 also requiring quarterly reports and the publication thereof for the information of the public; and the fact that the Garst & Bean Contract and the report of Chief Engineer Mitchell relating thereto are part of a printed report of the Chief Engineer to the Governor of Georgia now on file in the State library.

The Chief Justice and the two Justices concurring with him have also overlooked the presumption that the report of the Chief Engineer, printed by direction of the statute for the information of the public, was known to the members of the General Assembly at the time of the passage of the Act of January 27, 1852, ratifying the Garst & Bean Contract. None of the Georgia decisions cited in this paragraph have been reversed or set aside and the principles of law enunciated therein now have the force of a statute and are binding in this court.

4. The court and all of the justices have apparently lost sight of the grant by the State of Georgia to the Western Union Telegraph Company of "perpetual right of way to erect and maintain telegraph lines along the railroad (Western & Atlantic Railroad) of as many wires as it may deem necessary to its business, and additional lines and poles whenever the said party of the first part (Western Union Telegraph Company) shall so elect." This grant in perpetuity was accomplished by a contract dated August 18, 1870, between the Western Union Telegraph Company and the Superintendent of the Western & Atlantic Railroad, and Rufus B. Bulloch, as Governor. This contract, which was plead in defendant's answer, was authorized by the Act of January 15, 1852, and particularly by section 3 thereof making it "the duty of Superintendent of the Western & Atlantic Railroad to conduct all of the operations of the road connected with its construction, equipment and management \* \* \* [fol. 43] He shall also contract for and purchase machinery, cars, material, workshops and all other things necessary and proper for the construction, repair and equipment of the road and its general working and business; but all contracts and expenditures which exceed the sum of \$5,000.00, shall be subject to the approval of the Governor."

"5. The Court and all of its justices seem also to have last sight of the resolutions of the General Assembly of October 22, 1887 (Ga. Laws 1887, page 911); the resolutions of December 19, 1893 (Laws 1893, page 501); resolution of December 18, 1894 (Laws 1894, page 283) directing an examination into the facts and circumstances of the above mentioned contract of August 18, 1870, and directing its re-cission, if ground therefor be found; the examination into encroachments upon the right of way of the Western & Atlantic Railroad, and to make settlement on fair and equitable terms; and to investigate all matters pertaining to the Western & Atlantic Railroad, its rights of way and properties, and to consider all writings, papers and documents, whether admissible under the strict rules of law or not, and to give such force and effect as the Commission may deem proper, with direction that any judgment or decree shall be so molded in each case as to give effect to all of the rights and equities of the parties and subject matter.

"The court seems to have also overlooked the decision in *Howell vs. State*, 71 Ga. 224, to the effect that the practice of the various departments, as a means of collateral interpretation, is not to be rejected by the courts in passing upon the constitutionality of a law, but should receive consideration and weight."

"6. The following is a portion of the decision of this Court, concurred in, as petitioner understands, by all of the Justices:

"3. Under the doctrine of *nullus tempus occurrit regi*, adverse possession as against the State of Georgia cannot provide the basis for a prescriptive title; and the State is not affected by a statute of limitations unless it expressly consents to be held subject thereto."

"That portion of the decision applies, as petitioner understands it, equally to land and right of way of the Western & Atlantic Railroad in Georgia and in the State of Tennessee.

[fol. 44] "In so holding your petitioner believes that this Honorable Court has overlooked the difference between the sovereignty of the State of Georgia within its own domain and its sovereignty in operating a railroad within the sovereignty of Tennessee and its domain, and the following decisions of the Supreme Court of Tennessee to the effect that the State of Georgia, in owning and operating the Western Atlantic Railroad in the State of Tennessee, does so in the capacity of a private citizen and not as a sovereign; and that rules of law and of title by adverse possession and prescriptive title apply against the State of Georgia, owning and operating the Western & Atlantic Railroad, in the same manner as against private citizens; and have overlooked the statute of Tennessee under which title to land and easements are acquired in the State of Tennessee by adverse possession and prescriptive title, and particularly the following statutes and decisions of that State:—

"An act of the General Assembly of Tennessee, (Acts of 1837, Chap. 221, pp. 319, 320);

"An Act of the Legislature of Tennessee, (Chap. 196 of the Acts of 1847); and

"Sections 2765, 2764 and 2766 of the Code of Tennessee. These statutes, shown in exhibits 10, 11 and 12 attached to the original answer of defendant, were offered in evidence duly proven," but were excluded.

"Railroad vs. Donovan, 104 Tenn. 465-477; *Morris vs. State*, 67 Tenn. 725; *Shelby County vs. Nickford*, 102 Tenn. 402; *Tappan vs. W. & A. R. R. Co.*, 3 Lea. 103 (Tenn.); *W. & A. R. R. vs. Taylor*, 6 Heisk. 408 (Tenn.); *Hutchinson vs. W. & A. R. R.*, 6 Heisk. 624 (Tenn.).

"The court has also lost sight of the full faith and credit clause of the Constitution of the United States (Ga. Code Par. 6672), making it mandatory upon this court to give full faith and credit to the statutes and decisions of Tennessee as to the character of the State of Georgia in the State of Tennessee, as an owner of land and easements or property in that State."

"7. This Honorable Court, in its decision, held:—

(b) The plea of laches is not available as against a sovereign State. The State cannot be guilty of negligence or any other similar act involving the omission to perform a duty devolving upon an ordinary citizen.

"In so holding, petitioner respectfully submits that the Court has lost sight of Georgia Code, Paragraphs, 4369 and 4371, to-wit:—

"4369. The limitations herein provided apply equally to all courts; and in addition to the above, courts of equity may interpose an equitable bar, whenever, from the lapse of time and laches of the complainant, it would be inequitable to allow a party to enforce his legal rights."

"4371. Limitations to operate against the State. When, by the provisions of the foregoing sections, a private person would be barred of his rights, the State shall be barred of her rights under the same circumstances."

"The last mentioned ruling of this Honorable Court applies, as petitioner understands it, equally to the conduct of the State of Georgia within its own domain and also within the domain of the sovereign State of Tennessee; and in so doing has overlooked the above mentioned provision of the Constitution of the United States, Ga. Code Par. 6672."

"8. The decisions of Chief Justice Russell, concurred in by Justices Gilbert and Hill, seems to have overlooked the statement in the report of the Chief Engineer, attached to defendant's amendment to answer as an exhibit to paragraph XIII, that, 'I have had full and free conversations with his excellency George W. Towns upon the subject, and we are fully satisfied, not only from the nature of the telegraph, but from the experience of other roads, that there is no appendage more valuable in the efficient management of a railroad than a telegraph line, and we have come to the conclusion to submit to you this proposition.'

"This statement is followed by the contract offered to Garst &

Bean, under which the use of the telegraph lines is assured to the Western & Atlantic Railroad; and, following the acceptance of the contract, is the following statement in the Chief Engineer's letter to the Governor:

"Whereupon I passed an order, that so soon as the telegraph [fol. 46] Company is sufficiently organized to warrant the undertaking, the resident engineer and roadmaster make all necessary arrangements for carrying out *out* part of the foregoing contract; but we did not commence planting the posts till last May, and from a desire to economize as much as possible and do the work with our repairing parties so as not to interrupt their regular duties, the work has progressed slowly, but all the posts have been delivered and half or more are planted, and the wire stretched beyond Kingston. Telegraph offices have been established at Atlanta, Marietta, Cartersville and Kingston and a branch line has been established from Kingston to Rome and an office placed there."

"Our outlay of money for this job has been but little beyond the cost of posts, and they have been delivered at fifteen cents apiece. We expect the line to be in working order as far as Chattanooga in a month or two more, when we expect to be able to infuse additional efficiency in the management and render the anxiety felt for the tardy trains less painful."

"And the testimony of McDonald, a witness for one of defendant's and its chief engineer, that in the year 1870 and prior thereto a line of telegraph along the Western & Atlantic Railroad was "indispensable to the successful and expeditious handling of trains. It became an absolute necessity as soon as the telegraph was invented and found practicable."

"It is apparent from the Chief Engineer's report and from MacDonald's testimony that the use of the telegraph line was essential to the operation of the Western & Atlantic Railroad, and that the Western & Atlantic Railroad and the State of Georgia have, since its construction in the year 1850 or 1851, enjoyed the benefits and fruits of that telegraph line, under the several contracts of Garst & Bean, the Act of 1852, and the contract of 1870, above mentioned; and that the legislative committees appointed to investigate this contract and all encroachments upon the right of way, and to accord full equities and rights to all persons, without exacting as proof only such evidence as the law would ordinarily permit, have never reported in favor of the rescission of the contract of 1870 or the removal of this line of telegraph as an encroachment upon the right of way of the State. The resolutions referred to are those herein above mentioned [fol. 47] of the years 1887, 1893 and 1894."

"9. Justices Russell, Hill and Gilbert have, in their decisions, held:

"(a) 'It is not to be denied that in this action the plaintiff must recover upon the strength of its title and not upon the weakness of the title of the Western Union Telegraph Company.'



"(b) 'Of the fact that the State of Georgia is the owner of the Western & Atlantic Railroad, the lower court properly take judicial cognizance and no proof was acquired to establish the State's ownership.'

"Petitioner respectfully submits that these holdings are in conflict, the one with the other, and it does not follow therefrom, as these justices held, as petitioner understands their decision, that it was not incumbent upon the plaintiff to prove any title, but the burden rested upon the defendants to disprove plaintiff's title and to prove its own title.

"The three Justices last mentioned also held:

"There can be no question that the State is the owner of the right of way of the Western & Atlantic Railroad and has been its owner since the first beginning of the undertaking and from the time when the State invested the first dollar in the enterprise. It is immaterial whether the ownership is in fee or only an easement.'

"In so holding, the decision seems to have decided that the State of Georgia a railroad right of way only, and not the land, and all interest in the land upon which that right of way is situate. The petition only alleges ownership of railroad right of way.

"In holding that 'it is immaterial whether the ownership is in fee or only an easement,' the word 'fee' being used in the decision, as petitioner understands it, to mean land and all interest in land, sight seems to have been lost of the unanimous decisions of this Court adjudicating the difference between railroad right of way and land and all interest in land, and adjudicating the character and quality of interest in land, which is known by the term 'railroad right of way.'

"The decisions referred to are:

- G. & F. R. R. vs. Swain, 145 Ga. 817;
- [fol. 48] D. & N. R. R. Co. vs. Maxey, 139 Ga. 542;
- S. F. & W. Ry. vs. Postal, 118 Ga. 941;
- A. C. L. R. R. vs. Postal, 142 Ga. 531;
- A. B. & A. Ry. vs. Coffee Co., 152 Ga. 432;
- Long vs. Faulkner, 151 Ga. 837;
- Stewart vs. Garrett, 119 Ga. 386;
- Nicholson vs. Daffin, 142 Ga. 729;
- Augusta vs. Bredenburg, 146 Ga. 459.

"In so holding, sight has also been lost, apparently, of the decisions of the Supreme Court of Tennessee applicable to Western & Atlantic Railroad right of way in the State of Tennessee, which have adjudicated this question differently from the decision of the three justices of this court last referred to. These decisions are:

- Railroad vs. Donovan, 104 Tenn. 465;
- Ry. Co. Telfords Exors., 89 Tenn. 293.

"And the court has apparently lost sight of the provision of the Constitution of the United States (Ga. Code, Par. 6672) requiring full faith and credit to be given the Tennessee decisions and laws.



"The decision of the Supreme Court of Tennessee, as to land and railroad right of way, and the difference between them, controls as to land and railroad right of way within the State of Tennessee.

"In holding that 'It is immaterial whether the ownership is in fee or only an easement,' the decision seems to have overlooked the fact that easements of a different character can concurrently exist in and through the same piece of land; that an easement for a railroad right of way may exist over a strip of land of a certain width, and that thereon there may exist at the same time another easement for telegraphic lines, their maintenance and operation, and that the one easement does not and may not interfere with the enjoyment of the other easement, which this court has adjudicated in the following decision, apparently lost sight of:

B. & W. R. R. Co. vs. Wayeross, 91 Ga. 573.

"Furthermore, the court seems to have overlooked the fact that whether an easement for petitioner's telegraph lines may exist upon the land in which the State of Georgia has a railroad right of way [fol. 49] for its railroad without interfering therewith, is a question of fact to be determined by a jury, and which cannot be, under the laws of Georgia, determined by Judges, or even by the Justices of this Honorable Court."

Thereafter the said petition for rehearing was amended by calling the court's attention to an unanimous decision of the Supreme Court of Georgia in the case of Hope vs. Mayor, etc., 72 Ga. 246, of the same tenor and effect as the decision in Goldsmith vs. Rome R. R., 62 Ga. 473, cited in ground 1 of its motion for rehearing; and

Further amended said petition for rehearing calling attention to the decision in Morrison vs. Cook, 146 Ga. 570, 577, in which this court, citing the case of W. & A. R. R. vs. Carlton, 28 Ga. 180, plead in paragraph 1 of defendant's answer said:

"The State's ownership of the Western & Atlantic Railroad is a business venture, and in no sense an institution for exercise of governmental functions. In Western & Atlantic Railroad vs. Carlton, 28 Ga. 180, it was declared: 'When a State embarks, in an enterprise which is usually carried on by individual persons or companies, it voluntarily waives its sovereign character, and is subject to like regulations with persons engaged in the same calling.' Relatively to such a business the pecuniary interest of the State could no more give public character to the subject of incorporating railroad companies than could the interest of private persons engaged in the same kind of business."

#### Claim of Western Union Telegraph Company of Change of Rule of Construction Applicable to Plead Statutory Contract

Thereafter, but before final decision in said case, and before a decision has been rendered on said motion for rehearing, the Western Union Telegraph Company filed its claim that the effect of the divided opinion of the Supreme Court of Georgia would result in chang-

ing the rule of construction of this court, and which would be repugnant to the Constitution of the United States. The claim filed in the Supreme Court and directed to the Justices thereof was presented in the following language:

[fol. 50] "Now comes the Western Union Telegraph Company, Plaintiff in Error, and, before final decision is rendered in the above cause, makes known to the court its claim that the decision of Justices Russell, Hill and Gilbert, and by operation of law the divided opinion of the court, holding, or sustaining the lower court in holding, that sections six and nine, and each of those sections, of an act of Georgia entitled, "An Act to incorporate the Augusta, Atlanta & Nashville Magnetic Telegraph Company." approved January 27, 1852, violates the Constitution of Georgia, and particularly Art. 3, Sec. 7, Par. 8, (Code par. 6437), and are each of no force or effect, and are invalid, changes a rule of law of this court and of this State applicable to the contract made by that act, and changes the rule of construction of this court and of this State applicable to the statute, which is repugnant to the Constitution of the United States, and particularly to Art. 1, Sec. 10, Par. 1 thereof (Ga. Code Par. 6652), and which decision impairs the obligation of a contract contrary to said provision."

This claim was made in conformity with, and to obtain the benefit of, the amendment of February 17, 1922, to section 237 of the Judicial Code of the United States.

#### Final Judgment of Supreme Court of Georgia Denying Petition for Rehearing

On September 29, 1923, the Supreme Court of Georgia rendered the following judgment in this cause upon the petition of the Western Union Telegraph Company for a rehearing thereof, to wit: "Western Union Telegraph Co. v. State of Georgia et al."

"Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

"By a full bench, Judge W. V. Carter presiding in place of Associate Justice Hines, who was disqualified."

The final judgment or decree of the Supreme Court of Georgia was erroneous to the prejudice of petitioner as is shown in the assignment of error filed herewith.

Wherefore your petitioner, Western Union Telegraph Company, prays that a writ of error from the Supreme Court of the United States may issue in this cause to the Supreme Court of Georgia for the correction of errors so complained of, and that a transcript of the [fol. 51] record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of Georgia, may be sent to the Supreme Court of the United States as provided by law.

Petitioner desiring the writ of error to be a supersedeas prays an order touching the security to be required of it and the approval of such bond as is required in this cause.

This 21 day of November, A. D. 1923.

Francis R. Stark, Arthur Heyman, William L. Clay, Attorneys for Petitioner, Western Union Telegraph Company.

[File endorsement omitted.]

[fol. 52]

#### EXHIBIT 1 TO PETITION

"An Act to Authorize the Construction of the Magnetic Telegraph and Providing for the Protection of the Same.—Approved Dec. 29, 1847. Pam. 218."

"Whereas, many of the citizens of the State of Georgia are interested in the construction of lines of the Magnetic Telegraph, and desire the protection of their property, and the privilege of using the public roads and highways for their posts and wires:"

"1. Sec. 1. Be it enacted, That any company or individual may erect posts and wires, and other fixtures for Telegraphic purposes, on or by the side of any public road or highway in this State: Provided, that such posts, wires or fixtures shall in no case be so set or placed as to obstruct, hinder, or in any way interfere with the common uses or business of said roads or highways."

[fol. 53]

#### EXHIBIT 2 TO PETITION

On the 10th October, 1850, Messrs. Garst & Bean proposed to organize a company of stockholders and to build for them a telegraph line from Atlanta to Nashville, which was subsequently made to embrace the Georgia Railroad and to extend to Augusta, expressing a desire, at the same time of procuring the aid and countenance of the Western & Atlantic Railroad of the State of Georgia. The Company is called the Augusta, Atlanta and Nashville Telegraph Company. Mr. Garst retired and Mr. Bean prosecuted the enterprise alone. The following correspondence will explain the precise terms of the contract between the Road and the Telegraph Company:

Chief Engineer's Office W. & A. R. R.

Atlanta, Oct. 11, 1850.

GENTLEMEN: I have given much reflection to the subject of your note of yesterday, and I have had full and free conversation with

His Excellency George W. Towns upon the subject, and we are fully satisfied, not only from the nature of the telegraph but from the experience of other roads, that there is no appendage more valuable in the efficient management of a railroad than a telegraph line, and we have come to the conclusion to submit to you this proposition.

1. To furnish and erect the posts from Atlanta to Chattanooga, which shall be 24 feet long with four inches in diameter at the little end, and be planted four feet in the ground.

2. To grant you the use of our right of way for the telegraph company, and to pass your officers and materials along the road free of charge.

3. For and in consideration of the foregoing, the Western & Atlantic R. R. is to receive the sum of five thousand dollars to be placed to its credit upon the books of the Telegraph Company, and instead of interest on that sum, it is to receive dividends as they may be declared from time to time, and to be represented in the meetings of the company to that amount by the Chief Engineer, or such other person as may be appointed to represent the same.

4. And in further consideration of the foregoing services and grant, all the telegraph offices between Atlanta and Nashville erected [fol. 54] by the Company shall be subject to the use of said road free of charge, and said company shall erect as many offices as the road may require in addition to the regular offices of the Company, but the latter shall be at the expense of the road.

Yours respectfully, M. L. Mitchell, Chief Engineer.

Mr. David W. Garst and Mr. James M. Bean, Atlanta, Ga.

Atlanta, Oct. 11, 1850.

SIR: We hereby accept the proposition submitted in yours of this date.

Yours respectfully, D. W. Garst, J. M. Bean.

W. L. Mitchell, Esq., Chief Engineer &c., Atlanta, Ga.

Whereupon I passed an order, that so soon as the telegraph company is sufficiently organized to warrant the undertaking, the Resident Engineer and Road Master make all the necessary arrangements for carrying out our part of the foregoing contract; but we did not commence planting the posts till last May, and from a desire to economize as much as possible and do the work with our repairing parties so as not to interrupt their regular duties, the work has progressed slowly, but all the posts have been delivered and half or more are planted, and the wire stretched beyond Kingston. Telegraph offices have been established at Atlanta, Marietta, Cartersville and Kingston, and a branch line has been established from Kingston to Rome and an office placed there.

Our out-lay of money for this job has been but little beyond the

cost of the posts, and they have been delivered at fifteen cents apiece. We expect the line to be in working order as far as Chattanooga in a month or two more, when we expect to be able to infuse additional efficiency in the management and render the anxiety felt for the tardy trains less painful.

[fol. 55]

EXHIBIT 3 TO PETITION

"An Act to Incorporate the Augusta, Atlanta, and Nashville Magnetic Telegraph Company—Approved January 27, 1852"

"1. Sec. 1. Be it enacted by the Senate and House of Representatives of the State of Georgia in General Assembly met, and it is hereby enacted by the authority of the same, That James M. Bean, John H. Glover, and John P. King, and such persons as now are, or hereafter may be associated with them, including the subscribers in this State who may have acquired from Samuel F. B. Morse the right to construct and carry on the Electro Magnetic Telegraph, by him invented and patented, through this State and other States, on the route leading from the City of Augusta, through Atlanta, to the city of Nashville, in the State of Tennessee, be and they are hereby made and declared a body politic and corporate in law, for the purpose of constructing, erecting and maintaining a line of the said Telegraph, on the route aforesaid, or any other route through and within this State, and of transmitting intelligence by means thereof, by the name and style of the Augusta, Atlanta, and Nashville Magnetic Telegraph Company."

"3. Sec. III. That the said corporation shall have power and authority to build or purchase any connecting or side line in this State, having acquired the right to do so from the owners of Morse's Patent, and may enlarge its capital for that purpose."

"6. Sec. VI. And be it further enacted, That the contract entered into on the eleventh day of October, 1850, by William L. Mitchell, Chief Engineer of the Western and Atlantic Railroad, and D. W. Garst and J. M. Bean, on the part of said Company, be and the same is hereby ratified and affirmed, and that at every election, each share shall entitle its holder to one vote, and absent Stockholders may vote by agent or proxy, on producing written authority so to do. And in case of an equal number of votes on both sides, the election shall be decided by lot, and the Chief Engineer of said Railroad, or other officer having the chief control of said Road for the time being, shall by himself, or his proxy duly authorized, cast the vote to which the State is entitled under said contract."

"8. Sec. VIII. That the said Corporation shall have power and authority to contract with any person or persons, or bodies corporate, [fol. 56] for the purpose of connecting its lines of Telegraph with lines out of the State."

"9. Sec. IX. That the Augusta, Atlanta, and Nashville Magnetic Telegraph Company, shall have power and authority to set up their fixtures along and across any high road or high roads; and any railroad which nor or may hereafter belong to this State, and any waters or water courses of this State, without the same being held or deemed a public nuisance, or subject to be abated by any private person; Provided, The said fixtures be so placed as not to interfere with the common use of such roads, waters, or water courses, or with the convenience of any land owner, further than is unavoidable. \* \* \*

[fol. 57]

EXHIBIT 4 TO PETITION

Georgia Code of 1910

"#4369. Limitations in Equity.—The limitations herein provided apply equally to all courts; and in addition to the above, courts of equity may interpose an equitable bar, whenever, from the lapse of time and laches of the complainant, it would be inequitable to allow a party to enforce his legal rights."

"#4371. Limitations to Operate Against the State.—When, by the provisions of the foregoing sections, a private person would be barred of his rights, the State shall be barred of her rights under the same circumstances."

[fol. 58]

EXHIBIT 5 TO PETITION

Whereas, the Nashville, Chattanooga & St. Louis Railway, as Lessee of the Western & Atlantic Railroad, under the lease beginning December 27th, 1919, has represented to this Commission that the Western Union Telegraph Company is adversely using and occupying the right of way of said railroad by telegraph lines, poles, wires and other appurtenances without authority therefor from the State of Georgia, and against the consent of the Nashville, Chattanooga & St. Louis Railway:

And whereas, the said Nashville, Chattanooga & St. Louis Railway has requested this Commission to take appropriate action for the removal of this encroachment and the discontinuance of this adverse use in pursuance of the Act creating this Commission as amended August 4, 1916, and of Paragraph 14 of the new lease contract:

And whereas, the Counsel for this Commission has reported that the adverse use and occupancy of said right of way by the Western Union Telegraph Company is without lawful authority from the State of Georgia; and that the institution of appropriate proceedings for the removal of said encroachment and the discontinuance of said use is within the purview of said Act of August 4th, 1916, and within the contemplation of Paragraph 14 of the new lease contract dated May 11th, 1917:

Now, therefore, be it resolved, That William A. Wimbish, Counsel for this Commission, be, and he is hereby, authorized and directed to institute and prosecute, in the name and behalf of the State of Georgia, such suits and legal proceedings as may be appropriate for the removal of said encroachment and the discontinuance of said use: Provided, the Nashville, Chattanooga & St. Louis Railway, as such lessee, shall join in such suits and proceedings and defray the proper costs and expenses thereof without liability over against the State.

[fol. 59]

## SUPREME COURT OF GEORGIA

[Title omitted]

## ORDER ALLOWING WRIT OF ERROR—Filed Nov. 22, 1923

The petition of the Western Union Telegraph Company for writ of error in the above cause from the Supreme Court of the United States to the Supreme Court of Georgia and the assignment of errors filed therewith, and the record of said cause having been considered;

It is ordered that a writ of error be, and is, allowed from the Supreme Court of the United States to the Supreme Court of the State of Georgia, as prayed in said petition, and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with the law upon condition that the said petitioner, plaintiff in error, Western Union Telegraph Company, give good and sufficient security in the sum of Five Thousand Dollars (\$5,000.00), that said plaintiff in error shall prosecute said writ of error to effect, and, if said plaintiff in error fail to make his plea good, shall answer all damages and costs.

The said plaintiff in error now presenting a bond in the sum of Five Thousand Dollars (\$5,000.00), with American Surety Company of New York, as surety, it is ordered the same be, and is hereby approved. The writ of error shall operate as supersedeas.

In witness whereof I have hereunto set my hand this 22 day of Nov., A. D. 1923.

Richard B. Russell, Chief Justice of the Supreme Court of Georgia.

[File endorsement omitted.]

[fol. 60]

## SUPREME COURT OF GEORGIA

[Title omitted]

## ASSIGNMENT OF ERROR—Filed Nov. 22, 1923

On this 21st day of Nov., 1923, comes the Western Union Telegraph Company, Plaintiff in Error in the above cause, and with its petition for writ of error files this, its assignment of errors.



## I.

## Georgia Act of November 30th, 1915, Impairs Contracts

Error is assigned upon the final judgment or decree of the Supreme Court of Georgia, being the highest court of that State, in the above cause, where is drawn in question the validity of a statute on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of the validity of that statute, to wit:

The Statute of the General Assembly of Georgia entitled "An Act to provide for the leasing or other disposition of the Western & Atlantic Railroad and its properties; for the creation of a commission to effectuate such purpose, and to define its powers and duties; making an appropriation for the cost of the work required, and for other purposes," approved November 30, 1915, (Georgia Laws 1915, Extraordinary Session, page 119) and the amending act approved August 4th, 1916, each of which are in the petition in this cause alleged to be the foundation of this suit, and the basis of the decree therein sought.

Said statute and its amendment violates the Constitution of the [fol. 61] United States, Art. 1, Sec. 10, Par. 1, in that the said statute of November 30, 1915, and its amendment, is a law passed by the State of Georgia impairing the obligation of a contract, and of each of the following contracts, to wit:

1. A contract entered into October 11, 1850, between the State of Georgia and David W. Garst and James M. Bean, a copy of which is attached to an amendment to defendant's answer.

Georgia, by this contract granted a perpetual, irrevocable and assignable easement for telegraph lines to Garst & Bean along the Western & Atlantic Railroad from Atlanta to Chattanooga.

This contract was expressly plead in defense in the original answer paragraph VI (3), and in paragraph XVI amending the same; in defendant's separate plea in paragraph XX (2) of the amendment to its plea and answer, and in the next to the last paragraph of that plea; and in exhibit 22 (2) attached to the amendment to defendant's answer and plea and referred to in paragraphs XXI, XXII, XXIII, XXIV thereof; and was again particularly plead in a separate plea in paragraph XXV (a) (2).

2. The contract made with the Augusta, Atlanta & Nashville Magnetic Telegraph Company by the State of Georgia by the charter act of the Legislature of Georgia entitled "An Act to incorporate the Augusta, Atlanta & Nashville Magnetic Telegraph Company," approved January 27, 1852, and particularly the two contracts made by section 6 and by section 9 of that act, to wit:

Section 6 of that act in express terms ratified the above mentioned contract made by the State of Georgia with Garst & Bean October 11, 1850.

Section 9 of that act, without reference to the Garst & Bean contract, gave a separate and distinct grant in the following language: "That the Augusta, Atlanta & Nashville Magnetic Telegraph Company shall have power and authority to set up their fixtures along and across any \* \* \* railroad which now or may hereafter belong to this State."

[fol. 62] The easement granted was irrevocable, assignable and perpetual. The grant was without time limit.

This contract was expressly plead in defense in the original answer, paragraph VI (3); in defendant's separate plea in paragraph XX (3) of the amendment to its answer and plea, and in the next to the last paragraph of that plea; in exhibit 22 (3) attached to the amendment to defendant's answer and plea and referred to in paragraphs XXI, XXII, XXIII, XXIV, thereof; and was again particularly plead in a separate plea in paragraph XXV (a) (3).

3. The contract between the State of Georgia signed in its behalf by its Governor and the Superintendent of the Western & Atlantic Railroad and duly sealed, and also signed by the Western Union Telegraph Company, dated August 18, 1870.

The preamble of this contract recites that the agreement was entered into "in order to provide necessary telegraph facilities for the party of the second part (W. & A. R. R.) and to a better understanding of the terms on which the party of the first part (W. U. T. Co.) shall occupy the line of railroad of the party of the second part with the line or lines of telegraph wires belonging to the party of the first part, and to permanently settle and define the business relations between the respective parties hereto." In the body of the contract is a grant from the State of Georgia to the Western Union Telegraph Company of a "perpetual right of way to erect and maintain telegraph lines along said railroad of as many wires as it may deem necessary to its business, and additional lines of poles whenever" the Western Union Telegraph Company shall so elect.

This contract was expressly plead in defense in the original answer paragraph VI (10) with a copy attached as exhibit 7; in defendant's separate plea in paragraph XX (11), and the next to the last paragraph of that plea; in exhibit 22 (15) attached to the amendment to defendant's answer and plea and referred to in paragraphs [fol. 63] XXI, XXII, XXIII, XXIV thereof; and was again plead particularly in a separate plea in paragraph XXV (a) (4).

In support of this assignment of error the Western Union Telegraph Company shows:

In paragraph VIII of its original answer and in a separate plea in paragraph XXV of the amendment to its answer and plea, defendant alleged that if said statute or any amendment thereto has the force and effect, the delegates the authority, denied by defendant in its answer, but which defendant understands to be claimed by complainants and by the Commissioners appointed under that act, said statute of November 30, 1915, and its amendment, and any judgment or decree giving the statute the force and effect claimed by complainants, will impair the obligation of each of the above

specified contracts and will violate the above-mentioned provision of the Constitution of the United States.

The complainants claim:

That the said act of November 30, 1915, creating the Western & Atlantic Railroad Commission authorized and empowered that Commission to lease, and contract for the leasing of, the railroad properties known as the Western & Atlantic Railroad.

That those properties include the land and easements and rights in land now used, held and enjoyed by the Western Union Telegraph Company for the maintenance and operation of its telegraph lines along the Western & Atlantic Railroad.

That the lease of 1917 specified in the petition in this cause leasing the Western & Atlantic Railroad to the N. C. & St. L. Ry., did in fact include, and actually leases and conveys to the N. C. & St. L. Ry., the leasehold interest in, and the right to occupy and possess for a term of fifty (50) years, the identical land, easements and rights in land now possessed, enjoyed and used by the latter, to the exclusion of, and free from any interference or occupancy by, the Western Union Telegraph Company.

That said act of November 30, 1915, and the amendment of August 4, 1916, authorized said Commission in its discretion to deal [fol. 64] with and dispose of any and all encroachments, uses and occupancies upon any part of the right of way of the Western & Atlantic Railroad, whether permissive or adverse, including the use and occupancy by the Western Union Telegraph Company, whether the same be permissive or adverse, and with authority to take such action as the Commission should deem expedient to cause the removal and discontinuance of such occupancy.

That the act of November 30, 1915, and the amendment of August 4, 1916, authorized the insertion in said lease of a provision reserving to the State of Georgia the right to with-old delivery of possession and of right of possession of such parts of the right of way and other properties as may be so adversely used and occupied, until such encroachments and other adverse uses and occupancies shall have been removed and discontinued, to the end that the State of Georgia might and would cause the removal and discontinuance of such occupancies, including the occupancy by the Western Union Telegraph Company, and that the State of Georgia would then place its said lessee, the N. C. & St. L. Ry., in actual and exclusive possession of such adversely held or used portions of said properties, including the land and easements actually held and occupied by the Western Union Telegraph Company, and free from any adverse claim of right thereto on the part of the Western Union Telegraph Company; all of which is claimed by the plaintiffs to be in obligation of the State of Georgia under its act of November 30, 1915, and said amendment, and its lease to the N. C. & St. L. Ry. pursuant thereto.

The decree of the Supreme Court of Georgia gave to the said act of November 30, 1915, and said amendment, the force and effect claimed by plaintiffs, and actually carries the same into effect by

commanding the Western Union Telegraph Company to remove its telegraph lines and wires from the right of way of the Western & Atlantic Railroad, and thereby is impaired the obligations of each of the above mentioned contracts of the State of Georgia; (1) The contract with Garst & Bean; (2) The contract with the Augusta, [fol. 65] Atlanta & Nashville Magnetic Telegraph Company, whose successors in title, the Western Union Telegraph Company by its answer and plea claims to be; and (3) the contract of August 18, 1870, made directly with the Western Union Telegraph Company.

The defendant in its original answer, paragraph VI (3) to (9) inclusive, and in exhibit 22 attached to its amendment to plea and answer, paragraphs (2) to (14) inclusive, deraigned the title to the land and easements along the Western & Atlantic Railroad now held and enjoyed by the Western Union Telegraph Company from Garst & Bean and the Augusta, Atlanta & Nashville Magnetic Telegraph Company into itself, the Western Union Telegraph Company.

A full bench of six justices decided the case in the Supreme Court of Georgia. Chief Justice Russell and two associates freely conceded that quite a number of errors were made during the trial in the court below, but that none could have affected the result reached because, in their opinion, there was no valid grant either to Garst & Bean or to the Augusta, Atlanta & Nashville Magnetic Telegraph Company.

The three other justices held that there was a lawful grant to Garst & Bean and to the Augusta, Atlanta & Nashville Magnetic Telegraph Company, holding "we are of the opinion that this part of the answer set up a valid defense to the suit as brought by the plaintiffs, and the defendant should have been allowed to support the allegations of this part of the answer by proof, and it should have been allowed to deraign its title through successive conveyances from the Magnetic Telegraph Company to itself; and the court erred in striking those parts of the answer which indicated its chain of title. In maintaining that a reversal by this court is required by the errors of the court below, we plant ourselves upon the proposition that in parts of the plea and amendments stricken the defendant showed a right to the easement contested by grant; that is, under the contract between Mitchell and Garst & Bean, as affirmed and ratified by the General Assembly. And we think that the transmission of this title through successive conveyances to this defendant could be shown in the way indicated in defendant's answer. The facts and the circumstances pleaded should have been left for the consideration of [fol. 66] the jury; and we are of the opinion that in view of those facts and circumstances pleaded, as well as the documents introduced which bore upon the question in title, the jury would have been authorized to find against the State; especially in view of the one monumental, towering, dominating fact, that this defendant and its predecessors in title has for nearly three quarters of a century been in the peaceable enjoyment of the easement, the right to which is now denied it. If in any case a grant should be presumed, it should be presumed in favor of this defendant under the facts alleged and proved in this record."

The decision of three justices was that there was no grant from the State of Georgia either to Garst & Bean or to the Augusta, Atlanta & Nashville Magnetic Telegraph Company, and therefore no grant from which to deraign title into the Western Union Telegraph Company. Exactly the opposite decision was rendered by the other three justices, who further held that the title deraigned showed a transmission of title into the Western Union Telegraph Company and a good defense in the present case. It appears that the decision of the Georgia Supreme Court turned not upon the sufficiency of allegation, or of proof of transmission, of title from the Augusta, Atlanta & Nashville Magnetic Telegraph Company to the Western Union Telegraph Company, but only upon the question whether Garst & Bean or the Augusta, Atlanta & Nashville Magnetic Telegraph Company ever had any title from which there could be a deraignment.

Should the court, however, find it necessary to investigate the plead or proved deraignment and transmission of title from Garst & Bean and from the Augusta, Atlanta & Nashville Magnetic Telegraph Company, the following portions of the record are specified as supporting the claim of transmission of title herein made, to wit:

Proof of the corporate existence of the Augusta, Atlanta & Nashville Magnetic Telegraph Company, and the consequently presumed acceptance of its charter by proof of mortgages and notes executed by it, motion for new trial grounds 36, 37 and 38; Sheriff's deeds reciting executions obtained against it, motion for new trial grounds 39, 40, 41; the record of suits against it in Fulton Superior Court in which it appeared and in which judgments were rendered against [fol. 67] it, motion for new trial grounds 56, 57 and 58. All of this evidence proving acceptance of the charter was excluded.

The report of Mitchell, Chief Engineer, attached to paragraph 16 of the amendment to defendant's answer establishing the construction and existence of this telegraph line in the years 1850 and 1851; the testimony of Terrell and of Stephens showing the existence and operation of this telegraph line to their knowledge from about 1857 until acquired by the Western Union Telegraph Company in 1866. Those witnesses, and Lawton, Eulanks and MacDonald, proved those lines of telegraph to be the lines now occupied and possessed by the Western Union Telegraph Company. This testimony was admitted in evidence.

Testimony proving the transmission of title, and the instruments under which title was transmitted, and all of which was excluded, is set forth in grounds of motion for new trial grounds 42 to 55, and in the exhibits attached to said motion and referred to in said grounds respectively designated as exhibits H, I, J, K, L, M, N, O and P. The testimony referred to in grounds 49 to 55 is embodied in those grounds and not in exhibits, and includes the testimony of Judge Page Morris now of the United States District Court of Minnesota, and relates to the ownership and management of these telegraph lines during the Civil War, and includes the historical evidence furnished by Butler's Book and by Reed's Book, which supports the report of the Confederated Telegraph Company, and the

deed from it made immediately after the Civil War to the American Telegraph Company set forth as exhibits L and M to grounds 46 and 47 of the motion for new trial. All this evidence was excluded.

## II

### Lease by Georgia to N., C. & St. L. Railway Impairs Contracts

Error is assigned upon the final decree or judgment of the Supreme Court of Georgia in the above cause, where is drawn in question the validity of an authority exercised under the State of Georgia on the ground of its being repugnant to the Constitution of the [fol. 68] United States, and the decision is in favor of the validity of that authority, to wit:

The lease of May 11, 1917, of the Western & Atlantic Railroad to the N. C. & St. L. Ry. for a term of Fifty (50) years pursuant to the Georgia Act of November 30, 1915, plead in paragraph V of the petition and fully set forth in the brief of evidence. The said lease, an authority exercised under the State of Georgia, violates the Constitution of the United States, Art. 1, Sec. 10, Par. 1, in that it impairs the obligation of a contract, and of each of the following contracts, to wit:

1. A contract entered into October 11, 1850, between the State of Georgia and David W. Garst & James M. Bean, a copy of which is attached to an amendment to defendant's answer.

Georgia, by this contract granted a perpetual, irrevocable and assignable easement for telegraph lines to Garst & Bean along the Western & Atlantic Railroad from Atlanta to Chattanooga.

This contract was expressly plead in the original answer paragraph VI (3), and in paragraph XVI amending the same; in defendant's separate plea in paragraph XX (2) of the amendment to its plea and answer, and in the next to the last paragraph of that plea; in exhibit 22 (2) attached to the amendment to defendant's answer and plea and referred to in paragraphs XXI, XXII, XXIII, XXIV thereof; and was again particularly plead in a separate plea in paragraph XXV (a) (2).

2. The contract made with the Augusta, Atlanta & Nashville Magnetic Telegraph Company by the State of Georgia by the charter act of the Legislature of Georgia entitled, "An Act to incorporate the Augusta, Atlanta & Nashville Magnetic Telegraph Company," approved January 27, 1852, and particularly the two contracts made by section 6 and by section 9 of that act, to wit:

Section 6 of that act, in express terms ratified the above mentioned contract made by the State of Georgia with Garst & Bean October 11, 1850.

Section 9 of that act, without reference to the Garst & Bean contract, gave a separate and distinct grant in the following language: "That the Augusta, Atlanta & Nashville Magnetic Telegraph Company shall have power and authority to set up their



fixtures along and across any—railroad which now or may hereafter belong to this State.”

The easement granted was irrevocable, assignable and perpetual. This grant was without time limit.

This contract was expressly plead in defense in the original answer, paragraph VI (3); in defendant's separate plea in paragraph XX (3) of the amendment to its answer and plea, and the next to the last paragraph of that plea; in exhibit 22 (3) attached to the amendment to defendant's answer and plea, and referred to in paragraphs XXI, XXXII, XXIII, XXIV thereof; and was again particularly plead in a separate plea in paragraph XXV (a) (3).

3. The contract between the State of Georgia signed in its behalf by its Governor and the Superintendent of the Western & Atlantic Railroad and duly sealed, and also signed by the Western Union Telegraph Company, dated August 18, 1870.

The preamble of this contract recites that the agreement was entered into “in order to provide necessary telegraph facilities for the party of the second part (W. & A. R. R.) and to a better understanding of the terms on which the party of the first part (W. U. T. Co.) shall occupy the line of railroad of the party of the second part with the line or lines of telegraph wires belonging to the party of the first part, and to permanently settle and define the business relations between the respective parties hereto.” In the body of the contract is a grant from the State of Georgia to the Western Union Telegraph Company of a “perpetual right of way to erect and maintain telegraph lines along said railroad of as many wires as it may deem necessary to its business and additional lines of poles whenever” the Western Union Telegraph Company shall so elect.

This contract was expressly plead in defense in the original answer paragraph VI (10) with a copy attached as exhibit 7; in defendant's [fol. 70] separate plea in paragraph XX (11), and the next to the last paragraph of that plea; in exhibit 22 (15) attached to the amendment to defendant's answer and plea; and referred to in paragraphs XXI, XXII, XXIII, XXIV thereof; and was again plead particularly in a separate plea in paragraph XXV (a) (4).

In support of this assignment of error the Western Union Telegraph Company shows:

Paragraph VI and VII of the original petition alleged that the Western Union Telegraph Company is a trespasser on the right of way of the Western & Atlantic Railroad; that its occupancy is an encroachment and an adverse use and is without authority from the State of Georgia, and is contrary to the will of the N. C. & St. L. Ry., the present lessee.

Paragraph VIII of the petition alleges that the 14th paragraph of the present lease reserves to the State of Georgia the right to remove and cause to be discontinued any and all encroachments and other adverse uses and occupancies in and upon the right of way or other properties of the Western & Atlantic Railroad whether permissive or adverse, or whether with or without a claim of right; and to this end the present lessee consented that the State withhold de-



livery of possession or right of possession of such parts of the right of way and other properties as may be so adversely used and occupied until such encroachments and other adverse uses and occupancies shall have been removed and discontinued; alleges that the State may proceed to remove such encroachments; and alleges that this suit is instituted for that purpose, and to enable the State to fulfill its contractual obligations to the N. C. & St. L. Ry. under the present lease. The petition prays for the removal of the Western Union's lines "to the end that the petitioners, the State of Georgia, and its lessee, N. C. & St. L. Ry., may have and enjoy the full and unrestricted use and enjoyment of said right of way, free of any adverse claim of right thereto on the part of the Western Union Telegraph Company."

The defendant in paragraphs V and VII of its original answer asserted ownership of easements necessary for the construction and operation of its lines upon and along the Western & Atlantic Rail- [fol. 71] road, and denied that the same are covered by the present lease.

In paragraph VII of its original answer the defendant alleged that those easements had been granted by the State of Georgia to Garst & Bean and to the Augusta, Atlanta & Nashville Magnetic Telegraph Company, whose title had passed by plead conveyances and transfers into defendant; and that, in addition, the State of Georgia had granted those easements in perpetuity directly to defendant by its contract of August 18, 1870.

The defendant in paragraph VI of its original answer denied that the present lessee has any right, power or authority to object to the possession, construction and maintenance of said Western Union Telegraph Company's lines along the Western & Atlantic Railroad, or of the easements and interest therein now used and enjoyed by the Western Union Telegraph Company; and asserted that any interference with or removal of said lines would deprive defendant of its lawful rights and properties vested in and secured to it by the Constitution of Georgia.

In paragraph VIII of its original answer, and in its separate plea in paragraph XXV of the amendment to its answer and plea, the defendant denied that said lease covered, or could lawfully affect, its telegraph lines and easements upon and along the Western & Atlantic Railroad, or could cause, or could be the lawful ground for, the removal of said lines from said right of way, and the ousting of defendant therefrom, and the delivery of possession thereof to the N. C. & St. L. Ry.; denied that said Commission making the lease had the power and authority claimed by and for it; denied "that the Governor of Georgia and the Secretary of State of Georgia, who executed and delivered said lease, had any power and authority to insert in said lease the aforesaid provisions, or to make the claims or assert the rights in said provisions made, or to contract with respect thereto, particularly in so far as such provision, claims and claimed rights, apply to this defendant and its said lines of telegraph and easements;" and asserted that if said lease could be construed to have the force and effect claimed for it by the petitioners, the said lease, and any judgment or decree giving it that force and effect, would violate

[fol. 72] Art. 1, Sec. 10, Par. 1 of the Constitution of the United States.

The decree of the Supreme Court of Georgia did give to said lease the force and effect claimed by plaintiffs, and actually carries the same into effect by commanding the Western Union Telegraph Company to remove its telegraph lines and wires from the right of way of the Western & Atlantic Railroad; and thereby is impaired the obligation of each of the above mentioned contracts of the State of Georgia; (1) the contract with Garst & Bean; (2) the contract with the Augusta, Atlanta & Nashville Magnetic Telegraph Company, whose successor in title the Western Union Telegraph Company by its answer and plea claims to be; and (3) the contract of August 18, 1870, made directly with the Western Union Telegraph Company.

The present lease is embodied in the brief of evidence.

### III

#### Action of Georgia Through Its Western & Atlantic Railroad Commission Impairs Contracts

Error is assigned upon the final judgment or decree of the Supreme Court of Georgia in the above cause, where is drawn in question the validity of an authority exercised under the State of Georgia on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of the validity of that authority, to wit:

The resolution of the Western & Atlantic Railroad Commission plead in paragraph VIII of the petition and copy of which is attached as exhibit 14 to defendant's answer, declaring the Western Union Telegraph Company's lines to be in encroachment upon the right of way of the Western & Atlantic Railroad; declaring the Western Union Telegraph Company to be a trespasser on said right of way without right; and directing the institution of this suit for the removal of the lines of the Western Union Telegraph Company so that, in fulfillment of its obligation to its present lessee under the lease executed pursuant to the act of 1915, the State of Georgia may place in the possession of the N. C. & St. L. Ry., its present lessee, the very easements now occupied and possessed by the Western Union [fol. 73] Telegraph Company.

The said resolution, an authority exercised under the State of Georgia, violates the Constitution of the United States, Art. 1, Sec. 10, Par. 1, in that it impairs the obligation of a contract, and of each of the following contracts, to wit:

1. A contract entered into October 11, 1850, between the State of Georgia and David W. Garst and James M. Bean, a copy of which is attached to an amendment to defendant's answer.

Georgia, by this contract, granted a perpetual, irrevocable and assignable easement for telegraph lines to Garst & Bean along the Western & Atlantic Railroad from Atlanta to Chattanooga.

This contract was expressly plead in the original answer paragraph VI (3), and in paragraph XVI amending the same; in defendant's separate plea in paragraph XX (2) of the amendment to its plea and answer, in the next to the last paragraph of that plea; in exhibit 22 (2) attached to the amendment to defendant's answer and plea and referred to in paragraph XXI, XXII, XXIII, XXIV thereof; and was again plead particularly in a separate plea in paragraph XXV (a) (2).

2. The contract made with the Augusta, Atlanta & Nashville Magnetic Telegraph Company by the State of Georgia by the charter granted by act of the Legislature of Georgia entitled "An Act to incorporate the Augusta, Atlanta & Nashville Magnetic Telegraph Company," approved January 27, 1852, and particularly the two contracts made by section 6 and by section 9 of that act, to wit:

Section 6 of that act in express terms ratified the above mentioned contract made by the State of Georgia with Garst & Bean October 11, 1850.

Section 9 of that act, without reference to the Garst & Bean contract, gave a separate and distinct grant in the following language: "That the Augusta, Atlanta & Nashville Magnetic Telegraph Company shall have power and authority to set up their fixtures along and across any \* \* \* railroad which now or may hereafter belong to this State."

[fol. 74] The easement granted was irrevocable, assignable and perpetual. This grant was without the time limit.

This contract was expressly plead in defense in the original answer, paragraph VI (3); in defendant's separate plea in paragraph XX (3) of the amendment to its answer and plea; and in the next to the last paragraph of that plea; in exhibit 22 (3) attached to the amendment to defendant's answer and plea referred to in paragraphs XXI, XXII, XXIII, XXIV thereof; and was again particularly plead in a separate plea in paragraph XXV (a) (3).

3. The contract between the State of Georgia signed in its behalf by its Governor and the Superintendent of the Western & Atlantic Railroad and duly sealed, and also signed by the Western Union Telegraph Company, dated August 18, 1870.

The preamble of this contract recites that the agreement was entered into "in order to provide necessary telegraph facilities for the party of the second part (W. & —. R. R.) and to a better understanding of the terms on which the party of the first part (W. U. T. Co.) shall occupy the line of railroad of the party of the second part with the line or lines of telegraph wires belonging to the party of the first part, and to permanently settle and define the business relations between the respective parties hereto." In the body of the contract is a grant from the State of Georgia to the Western Union Telegraph Company of a "perpetual right of way to erect and maintain telegraph lines along said railroad of as many wires as it may deem necessary to its business and additional lines of poles whenever" the Western Union Telegraph Company shall so elect.

This contract was expressly plead in defense in the original answer paragraph VI (10) with a copy attached as exhibit 7; in defendant's separate plea in paragraph XX (11), and in the next to the last paragraph of that plea; in exhibit 22 (15) attached to the amendment to defendant's answer and plea, and referred to in paragraphs XXI, XXII, XXIII, XXIV thereof; and was again plead particularly in a separate plea in paragraph XXV (a) (4).

In support of this assignment of error the Western Union Telegraph Company shows:

[fol. 75] Complainants, in paragraph VIII of their petition, claimed that the Commission was authorized and empowered to contract for the leasing of, and to lease, the railroad properties known as the Western & Atlantic Railroad, and in its discretion to deal with and dispose of, any and all encroachments, uses and occupancies upon any part of the right of way of the Western & Atlantic Railroad, whether permissive or adverse; with further authority to take such action as the Commission may deem expedient, and to cause the removal and discontinuance of any such occupancy.

The plead resolution of the Commission declared the lines of the Western Union Telegraph Company on the Western & Atlantic Railroad right of way to be an encroachment thereon, and directed the institution of this suit for the removal of these lines so that, in fulfillment of its obligation under its present lease and particularly the 14th paragraph thereof, the State of Georgia may and will place its present lessee under the Act of 1915 in possession of the very easements now occupied by the Western Union Telegraph Company.

The defendant, in paragraph VI of its original answer, asserted its use and occupancy with its telegraph lines on the right of way of the Western & Atlantic Railroad and its ownership of the easements and interest in lands necessary therefor; and alleged that "any interference with, and any removal of, said lines of telegraph from the right of way of the Western & Atlantic Railroad, and any Georgia statute, law, judgment or decree so requiring, will deprive defendant of its lawful rights and properties vested in, and secured to, it by the laws and Constitutions of Georgia and of the United States."

In paragraph VIII of its original answer, and in a separate plea in paragraph XXV of the amendment to its answer and plea, defendant admitted the adoption of the resolution of the Commission attached to its original answer as exhibit 14, and denied that said Commission has the power and authority claimed for it, or the power and authority which it exercised, or the power to make the claims or to assert the rights made by the Commission in said lease, and particularly in so far as the same applies to said defendant and to its lines of telegraph and easements. The defendant further alleged that, if the [fol. 76] Act of November 30, 1915, or any amendment, has the force and effect, and delegates the authority, denied by defendant in its answer, but claimed for it by the complainants in this suit and by the Commission appointed under that act, then said statute is opposed to the Constitution of the United States, "and in any event the said act and resolution of said Commissioners and this suit, and any judg-

ment or decree of any court upholding, giving effect to, or enforcing said resolution of said Commissioners, and any judgment or decree of any court granting the prayers of the petition in this cause will violate the Constitution" of the United States and will impair the obligations of each of the above mentioned contracts in violation of Art. 1, Sec. 10, Par. 1, of that Constitution.

The decree of the Supreme Court of Georgia has given to said resolution of said Commission the force and effect claimed for it by the Commissioners and by complainants, and actually carries the same into effect by commanding the Western Union Telegraph Company to remove its telegraph lines and wires from the Western & Atlantic Railroad and thereby is impaired the obligations of each of the above mentioned contracts of the State of Georgia; (1) the contract with Garst & Bean; (2) the contract with the Augusta, Atlanta & Nashville Magnetic Telegraph Company, whose successor in title the Western Union Telegraph Company by its answer and plea claims to be; and (3) the contract of August 18, 1870, made directly with the Western Union Telegraph Company.

#### IV

#### Change in Rule of Construction by State Court

Error is assigned, as permitted by the amendment of February 17, 1922, to Judicial Code Section 237, upon the final judgment or decree of the Supreme Court of Georgia in the above suit involving the validity of a contract, wherein it is claimed that a change has been made in the rule of law or construction of statutes by the highest court of Georgia applicable to such contract, which would be and is repugnant to the Constitution of the United States, which claim was made in said State Court before final judgment, and the decision [fol. 77] was against the claim so made.

The change in the rule of law or construction, and the claim so made, is as follows:

Justice Custer, Presiding Justice Beck and Associate Justice Atkinson held that, under the rules of law or construction of statutes previously established by former decisions of the Supreme Court of Georgia, section 6 of the Georgia Act of January 27, 1852, entitled, "An Act to incorporate the Augusta, Atlanta & Nashville Magnetic Telegraph Company," is constitutional and valid, and ratifies the plead contract of October 11, 1850, between the State of Georgia and Garst & Bean. These Justices further held section 9 of the same act must be construed as constitutional and as granting easements for telegraph lines along the Western & Atlantic Railroad right of way to the corporation created by that act. The decision rendered by Justice Custer refers to the case of Goldsmith vs. Rome R. R. Co. 62 Ga. 473, which carefully reviewed all earlier decisions of Georgia upon the subject, and Justice Custer said "It covers and adjudicates the principle in question which we are called upon here to decide."

The Western Union Telegraph Company claims that the decision of Chief Justice Russell and the two justices concurring with him

sustaining the trial court, and the result of the equal division of the Justices of the Supreme Court of Georgia upon this question, changes the rule of law or construction previously existing; that without this change of construction section 6 and section 9 of the said act of January 27, 1852, would have been held by the Supreme Court of Georgia to contain no matter other than that which is expressed in the title of the act, not a violation of the Constitution of Georgia, but constitutional, valid, and constituting a lawful grant of easements in perpetuity upon and along the Western & Atlantic Railroad to the corporation created under that act.

Upon the rendition of the opinions of the Chief Justice and of Justice Custer, and the judgment of the divided court sustaining the trial judge, the Western Union Telegraph Company moved for a rehearing.

[fol. 78] In ground 1 of that motion the court's attention was called to the following:

1. The decision of the Chief Justice does not cite, but overlooks former unanimous decisions of the Supreme Court of Georgia by a full bench, which have never been reversed or set aside, to wit:

Goldsmith vs. Rome R. R., 62 Ga. 473.

Goldsmith vs. Augusta & Savannah R. R. Co., 62 Ga. 468.

Bonner vs. Milledgeville Ry. Co., 123 Ga. 115.

Davis vs. Bank of Fulton, 31 Ga. 69.

Hope vs. Mayor, 72 Ga. 246 (cited in amendment to motion).

2. Apparently the Supreme Court of Georgia overlooked the provision of article VII of the Constitution of Georgia embodied in Georgia Code paragraph 6207, to wit:

"A decision rendered by the Supreme Court prior to the first day of January 1897, and concurred in by three judges, or Justices, can not be reversed or materially changed except by the concurrence of at least five Justices. Unanimous decisions rendered after said date by a full bench of six shall not be overruled or materially modified except with the concurrence of six Justices, and then after argument had, in which the decision, by permission of the court, is expressly questioned and reviewed; and after such argument, the court in its decision shall state distinctly whether it affirms, reverses or changes such decision."

3. The Supreme Court of Georgia also overlooked "the following decisions of this court, by a full bench, holding that decisions of the character mentioned in said constitutional provisions have the force and effect of a statute until reversed or modified in the manner provided. Heard vs. Russell, 59 Ga. 25, 54; Lucas vs. Lucas, 30 Ga. 191; Fidelity Co. vs. Nesbit, 119 Ga. 316, 325."

Prior to the decision of the Supreme Court of Georgia for rehearing, and prior to final decision by it in the case, the Western Union Telegraph Company filed the following claim duly made in writing, signed by its counsel and presented to said Court, to wit:



[fol. 79] "Now comes the Western Union Telegraph Company, Plaintiff in Error, and, before final decision is rendered in the above cause, makes known to the court its claim that the decision of Justices Russell, Hill and Gilbert, and by operation of law the divided opinion of the court holding, or sustaining the lower court in holding, that sections six and nine, and each of those sections, of an act of Georgia entitled, 'An Act to incorporate the Augusta, Atlanta & Nashville Magnetic Telegraph Company,' approved January 27, 1852, violates the Constitution of Georgia, and particularly Art. 3, Sec. 7, Par. 8 (Code par. 6437), and are each of no force or effect, and are invalid, changes a rule of law of this court and of this State applicable to the contract made by that act, and changes the rule of construction of this court and of this State applicable to the statute, which is repugnant to the Constitution of the United States, and particularly to Art. 1, Sec. 10, Par. 1 thereof (Ga. Code Par. 6652), and which decision impairs the obligation of a contract contrary to said provision."

The report of Chief Engineer Mitchell, referred to in paragraph XVI of defendant's amendment to its answer and plea and attached thereto as an exhibit, and introduced in evidence, and the testimony of Stephens and Terrell, show that the telegraph lines now sought to be removed from the Western & Atlantic Railroad were constructed under the contract with Garst & Bean and under the said act of 1852 ratifying it; the said report of Chief Engineer Mitchell and the testimony of Hunter MacDonald, Chief Engineer for the N. C. & St. L. Ry. and a witness for the plaintiffs, show that the construction, maintenance and operation of a telegraph line along the Western & Atlantic Railroad was, to use the language of MacDonald, "indispensable to the successful and expeditious handling of trains. It became an absolute necessity as soon as the telegraph was invented and found practicable."

It is evident that the State of Georgia by operating this Railroad itself until the first lease in 1870 continuously received most valuable service and benefit from this line of telegraph and the existence and operation of this line was doubtless beneficial to the State when leases [fol. 80] were made in that the consideration for the lease was doubtless greater than would have been paid if there had been no telegraph lines along the Western & Atlantic Railroad.

The defendant deraigned title in its original answer and in its pleas and in amendments thereto from the grantee of said act of January 27, 1852, and offered in evidence proof thereof, all of which was stricken or excluded. The evidence so excluded is set forth in the motion for new trial.

Under the prior rule of law or construction above mentioned, title to easements and interest in land upon and along the Western & Atlantic Railroad necessary for the construction, maintenance and operation of the telegraph lines involved in this suit have long since vested in the Augusta, Atlanta & Nashville Magnetic Telegraph Company, and have not only never again passed to the State of Georgia, but that title did pass as above alleged to the successive assignees and



successors in title of the Augusta, Atlanta & Nashville Magnetic Telegraph Company, and finally, in the year 1866, into the Western Union Telegraph Company. From the time of the construction of those lines about the year 1850 until the decision in this cause, complete title to said easements has been in said Augusta, Atlanta & Nashville Magnetic Telegraph Company and in its said successors in title.

The effect of the final decision of the Supreme Court of Georgia in this cause, if not reversed by the Supreme Court of the United States, will be to divest the property, title and rights so vested in the Western Union Telegraph Company and its predecessors in title above mentioned. This is contrary to the Constitution of the United States and particularly Art. 1, Sec. 10, Par. 1, thereof, and to the fourteenth amendment thereto.

## V

### Title, Right, Privilege, or Immunity Claimed under the Constitution or Statute of the United States Denied

Error is assigned upon the final judgment or decree of the Supreme Court of Georgia in the above cause, where right, title, privilege or immunity is claimed under the constitution and a statute of the [fol. 81] United States, and the decision is against the title, right, privilege or immunity set up or claimed by the Western Union Telegraph Company.

The claim set up in its pleadings by the Western Union Telegraph Company is that any interference with, and any removal of, its lines of telegraph from the Western & Atlantic Railroad right of way, and any Georgia statute (referring to the act of 1915 and its amendment plead in the petition) and any law, judgment or decree authorizing such interference or requiring such removal, will deprive defendant of its lawful rights and properties vested in and secured to it by the laws and constitution of the United States (Paragraph VI of original answer); and that, if the act of 1915 and its amendment alleged in the petition in this cause, and which is the basis for this suit, or the resolution of the Commission appointed thereunder, is given the force and effect claimed by the complainants, the properties of the defendant, the Western Union Telegraph Company, will have been taken without due process of law and in violation of the 14th amendment of the Constitution of the United States. (Paragraph VIII of defendant's original answer, and the separate plea in paragraph XXV of the amendment.)

In support of this assignment of error the Western Union Telegraph Company shows:

After alleging the present lease of the Western & Atlantic Railroad pursuant to the Georgia Act of November 30, 1915 (paragraph V of the petition), the complainants alleged in paragraph VI of the petition that "the Western Union Telegraph Company is maintaining and operating over, upon and along the right of way of the Western & Atlantic Railroad between \* \* \* Atlanta \* \* \* and

Chattanooga \* \* \* telegraph lines, poles, wires and other appurtenances \* \* \* that said use and occupation of said right of way is without authority from the State of Georgia, and is contrary to the will and consent of the N. C. & St. L. Ry. as lessee of the Western & Atlantic Railroad, and that the same constitutes an unlawful encroachment upon said right of way and an adverse use thereof."

Answering paragraph VI of the petition, the Western Union Telegraph Company admitted that it maintained and operated telegraph lines upon and along what is known as the right of way of the Western & Atlantic Railroad from Atlanta to Chattanooga; that it had [fol. 82] owned, maintained and operated the same with the easements necessary therefor from the time of its acquisition thereof, June 12, 1866, to the present time; that prior to June 12, 1866, its predecessors in title had so owned, possessed and operated the same from the date of first construction in the year 1850; and that said telegraph lines, poles, wires and appurtenances, and the easements necessary therefor, were at all times from 1850 to the present time adversely owned, possessed and occupied by the Western Union Telegraph Company and its predecessors in title.

#### Grants from Georgia

The defendant, further answering paragraph VI of the petition, alleged the grant of easements for telegraph lines by the State of Georgia: (a) By its act of December 29, 1847; (b) By its contract with Garst & Bean made in the year 1850; (c) By the act of January 27, 1852, incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company. The answer deraigned title from these grantees into defendant in the year 1866.

The answer alleged a grant from the State of Georgia directly to the Western Union Telegraph Company of perpetual easements for said telegraph lines by its contract with defendant of August 18, 1870. That contract was sustained in favor of this defendant against the first lessee of said Railroad from the State of Georgia under the lease made in the year 1870 in a decision by the Supreme Court of the United States in the case of Western Union Telegraph Company vs. Western & Atlantic Railroad Company, 91 U. S. 283.

The defendant further alleged that by resolution of the General Assembly of Georgia October 22, 1887, the Governor was requested to instruct the attorney general to examine the facts and circumstances connected with said contract and grant of August 18, 1870, and, if grounds existed for the rescission thereof, to institute proceedings for that purpose. Defendant further alleged that no such proceeding had ever been instituted and that no grounds for rescission existed. The testimony of Stephens, excluded and set out in ground 67 of the motion for new trial, shows that no such proceeding has ever been instituted.

The defendant further plead in defense the resolutions of the General Assembly of Georgia of December 19, 1893, and of December 18, 1894, which recognized that adverse possession would

ripen into good title and bar the State from claim when under like circumstances a private person would be barred. The resolutions provide that "a settlement of each and every case of encroachment, adverse claim, occupation or right held against the interest of the State" shall be effected "in such a manner and on such terms as will be fair and equitable;" and that "any and all matters of controversy and issues, both of law and fact, between the State of Georgia and any person or persons affecting or relating to the Western & Atlantic Railroad, its rights, ways and properties," shall be settled by a decree which "shall be so moulded in each case as to establish and give effect to all the rights and equities of the parties in the subject matter."

#### Statute of Limitations and of Laches

The defendant, further answering, alleged the Georgia Act of March 6, 1856, limiting the time within which suits for the recovery of real estate, trespass and other actions could be brought, and particularly sections 38 and 39 thereof reading as follows:

Section XXXVIII. "When by the provisions of this Act a private person would be barred of his rights, the State shall be barred of her rights under the same circumstances."

Section XXXIX. "This Act shall in none of its provisions interfere with the principles established in the Court of Equity in relation to laches or stale demands, or the equitable bars in cases brought to said courts."

These sections of the act of 1856, embodied in paragraphs 4369 and 4370 of the Code of Georgia of 1910, read as follows:

"4369. Limitations in Equity.—The limitations herein provided apply equally to all courts; and in addition to the above, courts of equity may interpose an equitable bar, whenever, from the lapse of time and laches of the complainant, it would be inequitable to allow a party to enforce his legal rights."

"4371. Limitations to Operate Against the State.—When, by the provisions of the foregoing sections, a private person would be barred of his rights, the State shall be barred of her rights under the same circumstances."

Defendant alleged that the State of Georgia had been authorized to extend the construction of the Western & Atlantic Railroad from the [fol. 84] northern boundary line of Georgia to Chattanooga and to acquire necessary rights of way in land in Tennessee, "not in its sovereign capacity, but only in the capacity of, and only with the rights of, and subject to all the burdens and limitations imposed by law or equity upon, a private person or ordinary railroad company and subject to all statutes of the State of Tennessee relating to prescriptive title, to adverse possession and to limitation upon the right to sue" by acts both of Tennessee and of Georgia, particularly plead. Under said statutes of Tennessee the time has long since passed during which the present suit might have been maintained, and the same is now barred under those statutes.

Defendant, further answering paragraph VI of the petition, alleged that it and its predecessors in title from the time of the original construction of the telegraph line in 1850 to the present time have been in public, continuous, exclusive, uninterrupted, peaceable, actual and adverse possession of said lines of telegraph and of the easements in land used therefor; that said possession was adverse both to the State of Georgia and to all persons whomsoever owning or having any interest in the land upon which said lines of telegraph had been constructed.

In answering paragraph 1 of the petition defendant, while admitting that the State of Georgia owned a railway easement in land, denied that the telegraph easements in land enjoyed and used by defendants belonged to the State of Georgia, but asserted that they had long been continuously and adversely held, used and owned by defendants. Further answering the first paragraph of the petition, the defendant alleged that railway easements acquired by the State of Georgia for its said railroad will revert to the original land owners upon discontinuance of that railroad and its operation; and expressly denied that the State of Georgia is the owner of the land (as distinguished from an easement therein) through, over and upon which the Western & Atlantic Railroad is constructed.

#### United States Post Roads Act

Further answering paragraph VI of the petition defendant plead Art. —, Sec. 8 of the Constitution of the United States authorizing Congress to regulate commerce, to establish Post Offices and Post Roads, to raise and support armies, etc.; and to make laws necessary [fol. 85] to carry those provisions into effect. Defendant alleged that pursuant thereto railroads were made post roads by act of Congress; that the Act of July 24, 1866, in aid of the construction of telegraph lines and to secure to the Government the use of the same, known as the Post Roads Act, granted certain rights and benefits to, and imposed certain burdens and duties upon, telegraph companies accepting that act. The Western Union Telegraph Company accepted the provisions of that act June 8, 1867; and therefore rights in and to its said telegraph lines and easements vested in the United States.

#### Laches—Equity

The answer further claimed and asserted "that the State of Georgia, in giving and granting to its predecessors in title perpetual and assignable easements (acquired as hereinabove alleged by this defendant), and in giving and granting to this defendant perpetual easements in and by the aforesaid contract with the State of Georgia of August 18th, 1870, and by its conduct and statutes permitting this defendant by its adverse use and occupation, and through the laches, action and non-action of the State of Georgia, to acquire perpetual easements for said lines of telegraph upon said right of way of the Western & Atlantic Railroad, assented to, and made it lawful and permissible for the Western Union Telegraph Company to

make with the United States, the contract entered into as above stated by defendant's acceptance of the said statute of the United States. Having permitted and assented to that contract, the State of Georgia permitted the Western Union Telegraph Company to contract with the United States for, and to obtain from it, the benefits, properties, rights of way and privileges by that act granted, and assented to, and made it lawful for the Western Union Telegraph Company to assume, and to bind itself for the fulfillment of, the obligations imposed and created by said act of Congress."

Defendant further claimed that, having acquired a title to said easements from the State of Georgia, and by prescription against the individual persons owning the land through which the railroad right of way runs, said Post Roads Act and the contract between defendant and the United States thereunder is a part or increment of defendant's title, Congress by that contract having given the Western Union Telegraph Company permissive right to use all Post Roads including the Western & Atlantic Railroad.

[fol. 86] The defendant, further answering paragraph VI of said petition, alleged that "Any interference with, and any removal of, said lines of telegraph from the right of way of the Western & Atlantic Railroad, and any Georgia Statute, law, judgment or decree so requiring, will deprive defendant of its lawful rights and properties vested in, and secured to, it by the laws and Constitutions of Georgia and of the United States."

The cost and value of these telegraph lines along the Western & Atlantic Railroad is very great. Removal will result in great breakage, damage and loss; will destroy an important link in defendant's system of telegraph; and will cause the loss of the good will and business which it has built up and established along these lines. The Western Union Telegraph Company and its predecessors in title at great cost and expense to themselves have, during a long course of years, erected, constructed and maintained these telegraph lines of great importance as a link in their respective systems, and neither any land owner, nor the State of Georgia, nor any person, has ever objected thereto, or sought to prevent the same, until the objection made by the present lessee, upon which this suit is predicated.

The answer alleges the extent of defendant's system; the importance of this line of telegraph as a link in that system; the character and extent of the public and governmental service over these lines; and the importance of the maintenance of these lines to the Government, to the public, and to the persons along this line.

#### Georgia Act of 1915

Paragraph VIII of the petition alleges the Georgia Act of November 30, 1915, appointing the Western & Atlantic Railroad Commission for the purposes and with the powers therein expressed, including power and authority in its discretion to deal with, and dispose of, any and all encroachments upon, and uses and occupancies of, any part of the right of way of the Western & Atlantic Railroad,

whether permissive or adverse, and whether with or without claim of right, and to take such action as it might deem proper to cause the removal and discontinuance of any such use and occupancy; and to that end to institute and prosecute, in the name and behalf of the State of Georgia, suits or other legal proceedings in the pro-[fol. 87] tection of the State's interest or the assertion of the State's title. It is further alleged that said Commission lease to the State of Georgia the Western & Atlantic Railroad with the right reserved to the State of Georgia, and apparently the obligation accepted by it, to remove all encroachments and adverse uses, including the use and occupancy by the Western Union Telegraph Company. Paragraph VIII of the petition furthermore alleged that the Commission adopted a resolution, pursuant to said act and in accordance with the provisions of said lease, requiring this suit to be instituted for the removal of the telegraph lines of the Western Union Telegraph Company, and to bring about a discontinuance of the adverse use and occupancy by the Western Union Telegraph Company of the easements now enjoyed and used by it upon or along the Western & Atlantic Railroad.

#### W. & A. R. R. Commission

Answering paragraph VIII of the petition, the defendant set out as exhibit 14 to its answer the resolution of the Railroad Commission referred to in the petition. That resolution states that the present lessee has represented to it that the Western Union Telegraph Company is adversely using and occupying right of way of the Western & Atlantic Railroad with its telegraphic poles and lines without authority from the State of Georgia and against the consent of itself, the said lessee, and requests the Commission to take appropriate action to remove the alleged encroachments and to discontinue the adverse use by the Western Union Telegraph Company pursuant to the Georgia Act of August 4, 1916, and of paragraph 14 of the present lease.

The resolution further recites that the counsel for the Commission had reported that the adverse use and occupancy of said right of way by the Western Union Telegraph Company is without lawful authority from the State of Georgia, and that the institution of appropriate proceedings for the removal of the encroachment and the discontinuance of the use is within the purview and contemplation of said act and of said lease. The resolution then orders and directs the institution of this suit "in the name and behalf of the State of Georgia" for the removal of said encroachment and the discontinuance of said use."

#### Constitutional Questions Raised

Paragraph VIII of the original answer, after referring to the [fol. 88] provisions of said act of 1915, its said amendment, the present lease, and the said resolution of said Commission, denied that the Commission has the power and authority claimed for it by the pe-



tioners, and denies that the Government or Secretary of the State executing the lease had the right to a contract therein with respect to paragraph 14 thereof, or in respect to defendant's lines of telegraph and easements. The defendant, in paragraph VIII of its original answer,

"Denies that the act of November 30, 1915, or any amendment thereof authorizes and empowers said Commissioners therein appointed.

"To adopt said resolution, or to give the direction or authority therein set forth; or

"To take any act, or to institute this suit, or to institute any proceeding;

"To question or attack defendant's right to maintain, construct, reconstruct and operate in perpetuity its said lines of telegraph above described, or to attack defendant's right and title thereto and to the perpetual easements and rights in land necessary therefor; or

"To attack or impair any right or title in or to, or possession of, said easements and rights in, on, along, through or over the rights of way of the Western & Atlantic Railroad acquired as aforesaid by defendant or its predecessors in title; or

"To remove or to interfere with defendant's said lines of telegraph and easements; or

"To prevent or defeat the performance by defendant of its obligations under, or to deprive defendant of the rights, properties and franchises acquired by it under, the said act of Congress and its amendments.

"Defendant alleges, if the Georgia Act of November 30th, 1915, or any amendment thereto has the force and effect and delegates the authority herein above denied by this defendant, but which defendant understands to be claimed for it by complaints in this suit and by said Commissioners appointed under said act then said statute is opposed to the Constitutions of the United States and of [fol. 89] Georgia; and in any event the said act and resolution of the said Commissioners, and this suit, and any judgment or decree of any court giving to said statute the force and effect herein by defendant denied to it, but claimed in this suit by said complainants, and any judgment or decree of any court upholding, giving effect to, or enforcing said resolution of said Commissioners, and any judgment or decree of any court granting the prayers of the petition in this cause, will be violative of the Constitutions of Georgia and of the United States in that thereby

"(a) There will be an impairment of the obligations of contracts by a statute or law passed or made subsequently, which violates

"Georgia Constitution Art. 1, Sec. 3, Par. 2.

"United States Constitution Art. 1, Sec. 10, Par. 1.

"(b) The State of Georgia will have made and enforced a law revoking grants or privileges or immunities granted to defendant and its predecessors above alleged in such manner as to work injustice to defendant, which violates

"Georgia Constitution Art. 1, Sec. 3, Par. 3.



"(c) The rights, privileges and immunities, which, as above alleged, have vested in, or accrued to, defendant under and by virtue of the acts of the General Assembly of Georgia, will not be held inviolate by all courts before whom they may be brought in question, which violates

"Georgia Constitution Art. 12, Sec. 1, Par. 5.

"(d) Thereby property of defendant will have been taken without due process of law, which violates.

"Georgia Constitution Art. 1, Sec. 1, Par. 5.

"Georgia Constitution Art 1, Sec. 3, Par. 1.

"United States Constitution 14th amendment."

### Defenses Stricken

On motion of plaintiffs, all of the matters alleged or plead in defense stated in this assignments of error were stricken with the exception of a portion of the allegation relating to the grant from the State of Georgia to Garst & Bean by the contract of 1850; a part of the allegation relating to the grant under the act of January 27, 1852, incorporating the Augusta, Atlanta & Nashville Magnetic Telegraphic Company; a conveyance from Hammet to Morris; a conveyance from Wyly to Morris; and a conveyance from Morris to American Telegraph Company. The last three mentioned conveyances are links in defendant's chain of title. All other defenses including the plead unconstitutionality of the Georgia Act of November 30, 1915, and its amendment above mentioned, the unconstitutionality of the action and resolution of the Georgia Railroad Commission thereunder, and the unconstitutionality of the lease by the State of Georgia of the Western & Atlantic Railroad, were stricken.

Leave having been given, the defendant amended its pleas previously filed and stricken. The matters plead in defense in the original answer and stated in this assignment of error were repeated in separate pleas, to wit:

Paragraph XX is a separate plea in which defendant's title from the State of Georgia is deraigned.

In paragraph XXI the Georgia statutes of limitation is plead.

In paragraph XXII the Georgia statutes relating to prescriptive title, and facts showing adverse possession, are plead.

In paragraph XXIII the Tennessee statutes of limitation and facts proving adverse possession were plead.

In paragraph XXIV the Georgia statute providing that in equity the State of Georgia will be barred by laches when an individual under like circumstances would be barred, and facts showing laches are plead. It was also plead that, both under specified decisions of the Supreme Court of Georgia and of Tennessee, the State of Georgia occupied the position of a private individual in respect to the possession, ownership and operation of the Western & Atlantic Railroad, and the same rules of law, the same rules applicable to title, the same rules of court, and the same presumptions, apply to and

against the State of Georgia in respect to that railroad as are applicable to and against an individual, or a corporation owning a railroad.

Paragraph XXV pleads the unconstitutionality of the Georgia Act of November 30, 1915, of the amendment thereto, of the resolution of the Western & Atlantic Railroad Commission, and of the lease by Georgia of its railroad,—all alleged in the petition in [fol. 91] this cause as the foundation of this suit. In this paragraph the provisions of the Constitution of Georgia and of the United States claimed to have been violated are specified, and particular attention is there called to Art. 1, Sec. 10, Par. 1, of the Constitution of the United States, and to the 14th amendment thereof as having been violated.

On motion of the plaintiffs each and every one of these pleas embodied in paragraphs XX to XXV, inclusive, were stricken. Ground 59 of plaintiffs' motion to strike defendant's amended answer and pleas is directed to said paragraph XXV of defendant's amended answer and is in the following language:

"59. Plaintiffs move to have stricken paragraph XXV of said amendments, because: (1) Neither the Act of November 30th, 1915, nor the resolutions of the Western & Atlantic Railroad Commission, copy of which is attached to the original answer of defendant, nor any judgment or decree of this court giving to the said statute the force and effect claimed by plaintiffs in this suit, nor any judgment or decree upholding, giving the effect to or enforcing said resolution or granting the prayers of the petition, would be violative of the Constitution of Georgia or of the United States, as claimed by defendant. (2) The same allegations were made in the original answer of defendant and were stricken therefrom, on motion of plaintiffs, by order of this Court heretofore passed, still existing and unreversed."

### The Verdict

The jury trying the case found:

1. (By direction of the Court:) The State of Georgia is the sole and exclusive owner of the right of way of the Western & Atlantic Railroad from Atlanta, Georgia, to Chattanooga, Tennessee, in its sovereign and governmental capacity.

2. (By direction of the Court:) The Nashville, Chattanooga & St. Louis Railway, is the lessee from the State of Georgia of the Western & Atlantic Railroad and its right of way, operating said railroad under the corporate name of the Western & Atlantic Railroad under lease to the Nashville, Chattanooga & St. Louis Railway from the State of Georgia under contract dated May 11, 1917, under [fol. 92] the Act of the General Assembly of Georgia approved November 30, 1915, and the amendments thereto.

3. The Western Union Telegraph Company is maintaining and operating over and upon and along the right of way of the Western

& Atlantic Railroad between Atlantic, Georgia, and Chattanooga, Tennessee, telegraph lines, poles and wires.

5. The use and occupancy by the Western Union Telegraph Company of right of way of the Western & Atlantic Railroad is contrary to the will and consent of the N. C. & St. L. Ry., as lessee, and constitutes an unlawful encroachment thereon, and an adverse use thereof.

6. (By direction of the Court:) This suit is instituted and prosecuted in the name of the State of Georgia and in its behalf under the Act of the General Assembly of the State of Georgia of November 30, 1915, and amendments thereof, and the provisions of said contract and lease of May 11, 1917, by virtue of authority and direction of the Western & Atlantic Railroad Commission and is joined in by the Nashville, Chattanooga & St. Louis Railway as such lessee.

7. The Western Union Telegraph Company is occupying the right of way of the Western & Atlantic Railroad without the authority of the State of Georgia and without the consent of its lessees.

8. Twelve months from date is a reasonable time to allow the defendant for its removal of its telegraph lines from the right of way of the Western & Atlantic Railroad.

#### The Decree

Thereupon a decree was rendered which referred to the verdict and made the same the decree of the court as if set forth in the decree. The decree further found that the Western Union Telegraph Company is without lawful right or authority to use or occupy any portion of the right of way of the Western & Atlantic Railroad, commanded a cessation of such use and occupancy, and directed the removal of the telegraph lines from said right of way within twelve months from June 5, 1922. The defendant, its officers, servants and agents, were by the decree perpetually enjoined from such use and occupancy from and after twelve months from June 5, 1922, by which time defendant was commanded to remove its telegraph lines from said right of way.

A motion for new trial was made by the defendant, but was over- [fol. 93] ruled when the case was carried to the Supreme Court of Georgia, which by a divided opinion affirmed the judgment of the court below. The Chief Justice and two associates rendered an opinion sustaining the lower court. Justice Custer with the Presiding Justice and an associate Justice rendered an opinion reversing the court below.

Chief Justice Russell in the decision rendered by him said:

"I freely concede that there were quite a number of errors in the conduct of the trial but none of them affected or could have affected the result reached in the case, and in my opinion, no other result could have been attained either as a matter of reason or of law."

The decision rendered by the Chief Justice and the two associate justices concurring with him held,

"In this action the plaintiffs must recover upon the strength of its title and not upon the weakness of the title of the Western Union Telegraph Company;" but

"Of the fact that the State of Georgia is the owner of the Western & Atlantic Railroad, the lower court could properly take cognizance, and no proof was required to establish the State's ownership."

"Therefore, upon the reading of the petition the plaintiffs \* \* \* would have cast the burden upon the defendant to establish the validity of its claim of right or title;" and

"Therefore the question is still further narrowed to the single question as to whether the defendant in this case carried the burden of establishing its right to occupy any portion of the right of way of the Western & Atlantic Railroad."

"There was a failure on the part of the defendant in the court below \* \* \* to establish \* \* \* that it was the owner of any interest whatsoever in the right of way of the Western & Atlantic Railroad, either by grant, prescription or otherwise, and \* \* \* for that reason any error committed by the court during the trial was powerless to prevent the verdict rendered by the jury and the judgment entered thereon."

"There can be no question that the State is the owner of the right of way of the Western & Atlantic Railroad and has been its owner since the first beginning of the undertaking."

[fol. 94] "It is immaterial whether the ownership is in fee or only an easement."

"Even if \* \* \* the State only acquired an easement for its right of way it must be held that no right, interest, or enjoyment of even what the plaintiffs in error admits is owned by the State has ever been lawfully granted by the State to any one."

The brief evidence shows the absence of proof of conveyances of title to the State of Georgia of land upon which are situate the easements in land used by the State for its railroad, notwithstanding the following excluded testimony of Hunter MacDonald, the Chief Engineer for the present lessee from 1892 to date, to wit:

"There are deeds that give right of way for the Western & Atlantic Railroad over or through certain land lots; that is nearly all give right of way through my lands in certain land lots, generally calling for a width of 33 feet on each side for railroad purposes. The general character of those deeds is that the landlord generally gives a right of way through his land for 33 feet on each side of the railroad."

This is shown by ground 11 of the certified motion for new trial in this case. That testimony shows that the State did not own the land, but only easements in land. There was no proof that an easement for telegraph lines in the same land ever has, or does,

interfere with the State's railroad easement in the same land, or diminish or impair it.

The opinion of Judge Russell also holds that the State of Georgia in its sovereign capacity is the owner of the Western & Atlantic Railroad both in the State of Georgia and in the State of Tennessee. After stating a reason, the decision said "and for this reason we reject the argument that the case cited from several jurisdictions to sustain the proposition that the building and operation of the Western & Atlantic Railroad altered the status of Georgia as a sovereign State and reduced her in the same position in regard to this enterprise as she would have occupied as an individual.

Paragraph 1 of the original answer cited *Western & Atlantic Railroad* [fol. 95] *road vs. Carlton*, 28 Ga. 180 and *Schofield vs. Georgia*, 54 Ga. 635, and *Western & Atlantic Railroad Co. vs. Taylor*, 6 Heisk. Tenn. 408, and *Hutchinson vs. Western & Atlantic Railroad*, 6 Heisk. 634. The last two decisions are by the Supreme Court of Tennessee.

The reference by Chief Justice Russell to the case cited as opposing the view entertained by him necessarily includes the four cases just named in paragraph 1 of the original answer.

#### Unconstitutional Effect of Final Decree

The effect of the decree rendered in this cause is,

1. The decree adjudges that the Georgia act of November 30, 1915, authorized the lease to the N. C. & St. L. Ry., of the easements now used by the Western Union Telegraph Company, which the evidence shows were formerly granted in perpetuity by Georgia to Garst & Bean and to the Augusta, Atlanta & Nashville Magnetic Telegraph Company, the predecessor in title of the Western Union Telegraph Company, and which are the same easements which Georgia subsequently in 1870 granted in perpetuity directly to the Western Union Telegraph Company by the contract dated August 18, 1870.

The decree adjudges that Georgia, by its lease of 1917, did lease to the N. C. & St. L. Ry., the easements now used by the Western Union Telegraph Company, and thereby Georgia obligated itself to remove the Western Union Telegraph Company and its lines of telegraph and to place the N. C. & St. L. Ry. in possession of those easements used by the Western Union Telegraph Company for its lines.

The decree adjudges that Georgia, by its said lease act of November 30, 1915, and its amendments, authorized the Western & Atlantic Railroad Commission created thereby to question and attack the title of the Western Union Telegraph Company to the easements used and occupied by it, and to remove its lines of telegraph from the right of way of the Western & Atlantic Railroad.

2. The decree sustains the findings of the Western & Atlantic Railroad Commission that the telegraph lines of the Western Union Telegraph Company are an unlawful encroachment upon the right of

way of the Western & Atlantic Railroad; sustains the finding of that Commission that the Western Union Telegraph Company has no [fol. 96] right to maintain or operate those telegraph lines where now located, and does not possess or own the easements necessary therefor; and sustains the finding and determination by the Commission that these telegraph lines must be removed.

These findings by the Commission, plead in the petition, are fully set out in the copy of the resolution of the Commission attached to defendant's original answer as exhibit 14.

These findings and judgments by the Commission, claimed to be pursuant to, and to be authorized by, the act of November 30, 1915, as amended, were without notice to, and without service of any process upon, the Western Union Telegraph Company advising it of, or calling upon it to be present at any session or hearing of the Commission to pass upon these questions. Neither said act nor any amendment thereto provides for the giving of any notice to the Western Union Telegraph Company of any hearing or consideration by the Commission of any matter affecting its interest, nor does said act, or any amendment, provide for the service of any process upon the Western Union Telegraph Company to appear before said Commission, or to be present at any session of the Commission to pass upon the questions which it did pass upon in its said resolution. No provision is made in said act, or any amendment, to afford the Western Union Telegraph Company an opportunity to be heard by the Commission upon any matters affected by said resolution, or to present its claims and defenses, and to resist the claims of the present lessee made against the Western Union Telegraph Company and its properties and rights. No such opportunity was in fact afforded the Western Union Telegraph Company.

3. This suit (as shown by the allegations and prayers of the petition) is not a suit to settle and determine claims of right or of title of the Western Union Telegraph Company to easements upon the right of way of the Western & Atlantic Railroad, but is really a suit by Georgia for a judgment and decree to enforce the findings of the Western & Atlantic Railroad Commission as expressed in its said resolution, and to force the Western Union Telegraph Company to remove its lines from the railroad right of way in accordance with the findings of the Commission to enable the present lessee to have and enjoy the easements, properties and rights now possessed and used [fol. 97] by the Western Union Telegraph Company, but granted to the N. C. & St. L. Ry., by the present lease.

This is practically what the decree did. Moreover, in the trial resulting in this decree such effect was given to the Georgia lease act of November 30, 1915, to the lease by Georgia, and to the action by Georgia through its Commission, that Georgia and its present lessee, who invoked the machinery of her courts to obtain a decree, were relieved of the burdens and obligations imposed upon suitors in those courts to establish by competent proof their claims, asserted rights and plead title; were relieved of the presumptions against an ordinary suitor, and particularly the presumption arising



upon proof of title out of a plaintiff that the title remains out of that plaintiff until proof that he has again acquired it; and even denials by defendant of allegations of the petition were on the State's motion stricken.

Moreover such force and effect was given to the Georgia lease act of November 30, 1915, and its amendments, to the Georgia lease of 1917, and to the action of Georgia through its Western & Atlantic Railroad Commission, as to cause the court to strike defendant's plea of laches in bar of the claims made and of the decree sought under facts alleged in that plea which would bar an individual, notwithstanding the prior Georgia Act of 1856 declaring by legislative enactment that the State of Georgia in such cases would be barred. That act has remained of full force and effect from its passage in 1856 to the present time.

Such force and effect was given to the Georgia lease act of 1915, and its amendments, to the Georgia lease of 1917, and to the action of Georgia through its Western & Atlantic Railroad Commission, that defendant's plea of title by adverse possession under plead statutes of Tennessee for the length of time therein prescribed to make the title of the possessor good was stricken, and that defense denied defendant. The denial by defendant of the allegation of the petition that Georgia owned and operated its railroad in Tennessee in a sovereign capacity, and defendant's assertion that it owned and operated its railroad in Tennessee as a private individual only, with only the rights of, and subject to the law applicable to and against an individual, were stricken and defendant was deprived of those defenses, notwithstanding the requirements of Art. 4, Sec. 1, Par. 1, of the Constitution of the United States requiring all courts to give full faith and credit to the laws of Tennessee.

Moreover, such force and effect was given to the Georgia lease act of 1915, and its amendments, to the Georgia lease of 1917, and to the action of Georgia through its Western & Atlantic Railroad Commission, that, contrary to the rules of law prevailing and applicable, the action of Georgia through its Western & Atlantic Railroad Commission was enforced without proof that Georgia owned the land on which its right of way is situate, and without proof to establish whether it did so own that land or owned only an easement in that land for railroad purposes, and, in the latter event, without proof that the easements used by the Western Union Telegraph Company for its telegraph lines interfered with or impaired the easement in the same land of the State of Georgia for railroad purposes. The decree gives the force and effect in this paragraph stated, notwithstanding prior decisions of the Supreme Court of Georgia and of the Supreme Court of Tennessee deciding that the railroad is not the owner of the land through which its right of way is situate, but is the owner of a mere easement for railroad purposes only, the ownership of the soil and of the every other use remaining in the individual land owner. These decisions of the Supreme Court of Georgia and of Tennessee were particularly called to the attention of the Supreme Court of Georgia in the petition of the Western



Union Telegraph Company presented to it for a rehearing in this cause.

Such force and effect was given the Georgia lease act of 1915, and its amendments, to the Georgia lease of 1917, and to the action of Georgia through its Western & Atlantic Railroad Commission, that the easements and interest in land, and the title and properties which had vested in the Western Union Telegraph Company under the laws and Constitutions of Georgia under the facts and circumstances plead in defendant's answer, were stricken by the court, defendant was not permitted to prove these facts in evidence, or to establish its plead rights, titles and claims.

The Georgia lease act of November 30, 1915, and its amendments, [fol. 99] the Georgia lease of 1917 of the Western & Atlantic Railroad, and the action of Georgia through its Western & Atlantic Railroad Commission, as construed and enforced by the final decree of the Supreme Court of Georgia, in this cause, deprive the Western Union Telegraph Company of property without due process of law and deny it the equal protection of the laws contrary to the 14th amendment of the Constitution of the United States.

Wherefore the Western Union Telegraph Company prays that the final decree or order of the Supreme Court of Georgia in the above cause dated September 13, 1923, affirming the final judgment or decree of the Superior Court of Fulton County, Georgia, (a petition for rehearing having been denied by the Supreme Court of Georgia by order dated September 29, 1923), be set aside and be reversed.

Francis R. Stark, Arthur Heyman, William L. Clay, Attorneys for Western Union Tel. Co., Plaintiff in Error.

[File endorsement omitted.]

[fol. 100] WRIT OF ERROR—Filed Nov. 22, 1923

UNITED STATES OF AMERICA, ss:

(Seal of U. S. District Court, N. D. Georgia.)

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Georgia, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the State of Georgia, as owner of Western & Atlantic Railroad, and Nashville, Chattanooga & St. Louis Railway, as lessees operating said Railroad under the corporate name and style of Western & Atlantic Railroad, plaintiffs, and Western Union Telegraph Company, defendant, wherein was drawn in ques-

tion the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, or laws of the United States, and the decision was in favor of their validity; and where a right, title, *title*, privilege or immunity is claimed under the Constitution, or a statute of, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed; and in said suit involving the validity of a contract it is claimed that the final decision of the Supreme Court of Georgia in this cause makes a change in the rule of law or construction of statutes by the highest court of the State of Georgia applicable to such contract repugnant to the Constitution of the United States, and a claim to that effect was made in the Supreme Court of Georgia at some time before final judgment was entered by it, and the decision is against the claim so made; a manifest error hath happened to the great damage of the Western Union Telegraph Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Wm. H. Taft, Chief Justice of the United States, the 22nd day of November, in the year of our Lord one thousand nine hundred and twenty-three.

O. C. Fuller, Clerk of the District Court of the United States for the Northern District of Georgia.

Allowed by Richard B. Russell, Chief Justice of the Supreme Court of Georgia.

[File endorsement omitted.]

---

[fol. 102] CITATION AND SERVICE—Filed Nov. 22, 1923; omitted in printing

---

[fol. 103] SUPREME COURT OF GEORGIA

BOND ON WRIT OF ERROR FOR \$5,000.00—Approved and filed Nov. 22, 1923; omitted in printing

[fol. 104] [File endorsement omitted.]

[fol. 105] Authority of Signers for Surety

Extract from the Record Book of the Board of Trustees of the American Surety Company of New York—Omitted in printing

[fol. 106] SUPREME COURT OF GEORGIA

[Title omitted]

#### CERTIFICATE OF LODGMENT

The Western Union Telegraph Company, plaintiff in error in the above cause, on the 22d day of Nov. 1923, filed with the undersigned, Z. D. Harrison, Clerk of the Supreme Court of the State of Georgia, in the above entitled action the following documents:

1. The original bond approved by the Honorable Richard B. Russell, Chief Justice of the Supreme Court of Georgia, on the 22d day of November, 1923, given as security for the prosecution of the writ of error in said cause in the Supreme Court of the United States and to answer all damages and costs if the plaintiff in error fail to make its plea good.

2. The original writ of error issued by the Honorable Richard B. Russell, Chief Justice of the Supreme Court of Georgia, on the 22d day of Nov., 1923, together with four (4) copies thereof, one for each defendant in error and one for the file of my office.

In witness whereof I have hereunto set my hand and affixed the official seal of the Supreme Court of Georgia at my office in the City of Atlanta, State of Georgia, this 22d day of Nov. A. D. 1923.

Z. D. Harrison, Clerk of the Supreme Court of Georgia.

[fol. 107] SUPREME COURT OF GEORGIA

[Title omitted]

#### PRÆCIPUE FOR TRANSCRIPT OF RECORD—Filed Nov. 22. 1923

To Z. D. Harrison, Esquire, Clerk of the Supreme Court of Georgia:

Please prepare forthwith a certified transcript of the entire record in the above cause to be incorporated into the transcript of record on writ of error to the final order or decree made and entered therein by the Supreme Court of Georgia, dated September —, 1923, (the Supreme Court of Georgia having by its order or judgment dated September —, 1923, refused to allow a rehearing in said cause), which record consists of the following:

1. Original petition with the entry of filing thereof.

2. Original answer and all exhibits thereto with the entry of filing thereof.

3. Plaintiffs' motion to strike original answer and portions thereof with the entry of filing thereof.

4. The order of Judge Pendleton of December 4th, 1920, on the last above motion with the entry of filing thereof.

5. Bill of exceptions pendente lite assigning error on the last above order with the entry of filing thereof.

[fol. 108] 6. The amendment to the answer of defendant with all exhibits thereto, the first numbered paragraph of this amendment being XII with the entry of filing thereof.

7. The amendment to defendant's answer with all exhibits thereto, the first numbered paragraph of this amendment being XX with the entry of filing thereof.

8. Plaintiffs' motion to strike from the last above amendments to defendant's answer with the entry of filing thereof.

9. The order on the last mentioned motion rendered June 22nd, 1921, with the entry of filing thereof.

10. Bill of exceptions pendente lite assigning error on the last above mentioned order with the entry of filing thereof.

11. The brief of the evidence in said cause and the exhibits thereto, the entry of filing thereof, and the order of the court approving the same.

12. The charge of court and the order approving the same with the entry of filing thereof.

13. The verdict with the entry of filing thereof.

14. The final decree with the entry of filing thereof.

15. Bill of exceptions pendente lite assigning error on the refusal of the court to grant a non-suit, and on the final decree with the entry of filing thereof.

16. Original motion for new trial with the entry of filing thereof.

17. Order on motion for new trial dated June 14th, 1922, and the acknowledgment of service of said motion for new trial and of the order thereon endorsed thereon by counsel for plaintiffs, with the entry of filing thereof.

18. Order on motion for new trial dated Sept. 15th, 1922, the assent of counsel for both parties endorsed thereon, with the entry of [fol. 109] filing thereof.

19. Order on motion for new trial dated Oct. 14th, 1922, the assent of counsel for both parties endorsed thereon with the entry of filing thereof.

20. Amendment to motion for new trial and all exhibits thereto, the order approving the same, with the entry of filing thereof.

21. Judgment or decision overruling defendant's motion for new trial, with the entry of filing thereof.

22. The signed and certified bill of exceptions in said cause sued out by the Western Union Telegraph Company, plaintiff in error, to the Supreme Court of Georgia, together with the date of filing thereof and the acknowledgment of service thereon.

23. The final judgment or decision of the Supreme Court of Georgia in said cause dated September —, 1923.

24. The opinion of the Chief Justice of Georgia in said cause concurred in by Associate Justices Hill and Gilbert.

25. The decision of Justice Custer concurred in by Presiding Justice Beck and Associate Justice Atkinson.

26. The petition of the Western Union Telegraph Company, plaintiff in error in said cause, to the Supreme Court of Georgia for a rehearing of said cause by it with a certificate of counsel for petitioners and the entry of filing thereof in the Supreme Court.

27. The amendment of the Western Union Telegraph Company to said petition for rehearing, with the certificate of counsel and the entry of filing thereof.

28. The claim of the Western Union Telegraph Company filed in the Supreme Court of Georgia and presented to the Court before rendition of final decree that the judgment of the Court changes a rule of construction which is repugnant to the Constitution of the [fol. 110] United States and particularly to Art. 1, Sec. 10, Par. 1. thereof, and impairs the obligation of a contract with the entry of filing thereof.

29. The final order or judgment of the Supreme Court of Georgia upon said petition of the Western Union Telegraph Company for rehearing.

30. The petition for writ of error.

31. The order allowing the writ of error.

32. The assignment of error.

33. The original writ of error.

34. The original citation with the acknowledgment of service thereon.

35. The supersedeas bond and the entry of approval thereof.

36. Certificate of lodgment of bond and copies of writ of error.

37. This *præcipe* and the acknowledgment of service thereof.

Francis R. Stark, Arthur Heyman, William L. Clay, Attorneys for Plaintiff in Error.

Due and legal service of the foregoing *præcipe* hereby acknowledged, copy received, this 22 day of Nov. A. D. 1923.

Hooper Alexander, Henry Peeples, Tye, Peeples & Tye, Attorneys for Defendants in Error.

[File endorsement omitted.]

Plaintiffs in error and defendants in error hereby consent that the *præcipe* and the foregoing specification of record, necessary for consideration, be amended by striking from each Nos. 18 and 19 thereof, being orders on motion for new trial dated September 15, 1922, and October 14, 1922, which orders merely postpone the hearing of the motion for new trial.

Francis R. Stark, Arthur Heyman, William L. Clay, Attorneys for Plaintiffs in Error. Fitzgerald Hall, Tye, Peeples & Tye, H. C. Peeples, Hooper Alexander, Attorneys for Defendants in Error.

---

[fol. 111] STATE OF GEORGIA,  
County of Fulton:

FULTON SUPERIOR COURT, MARCH TERM, 1920

[Title omitted]

PETITION—Filed Jan. 28, 1920

To the Honorable the Superior Court of said County:

The State of Georgia, as owner of the Western & Atlantic Railroad, and the Nashville, Chattanooga & St. Louis Railway, as lessee from the State of said Western & Atlantic Railroad, operating said railroad under the corporate name and style of Western & Atlantic Railroad, bring this their petition against the Western Union Telegraph Company, and thereup- respectfully represent unto the Court as follows, to-wit:

1. The state of Georgia is the sole and exclusive owner of the Western & Atlantic Railroad, the same being a railway communication, together with its rights of way and properties, extending from the City of Atlanta in the State of Georgia, through the Counties of Fulton, Cobb, Bartow, Gordon, Whitfield and Catoosa, in the State of Georgia, and the county of Hamilton, in the State of Tennessee, to the City of Chattanooga, Tennessee. The Western and Atlantic Railroad was constructed as a great public work by the State of

Georgia solely out of public funds. All of the property appertaining to said railroad, including its right of way and terminals, is exclusively owned by the State of Georgia, directly and immediately, in its sovereign or governmental capacity. The said railroad has never been incorporated, nor has it any capital stock, nor does it constitute a legal entity. It is public property, and the income derived therefrom constitutes a part of the public revenue, and is, under the laws of the State, devoted to public uses.

2. The Nashville, Chattanooga & St. Louis Railway is a corporation of the State of Tennessee, and operates the said Western & Atlantic Railroad under a lease from the State of Georgia as hereinafter specified, under the corporate name of the Western & Atlantic Railroad.

[fol. 112] 3. The Western Union Telegraph Company is a foreign corporation, engaged in the business of transmitting intelligence by wire, having and maintaining offices and agents, and conducting business in the City of Atlanta and the County of Fulton, Georgia, and in the other Counties above mentioned, through which the Western & Atlantic Railroad runs.

4. The said Western & Atlantic Railroad was for a number of years operated directly by the State, through its legislative and executive departments, that is to say, until the 27th day of December 1870, when said railroad was leased to and operated by a private corporation known as the Western & Atlantic Railroad Company, for a term of 20 years, pursuant to an Act of the General Assembly of the State of Georgia, approved October 25th, 1870, (Acts of 1870, page 423) reference to which is hereby had.

Upon the expiration of the lease in the foregoing paragraph referred to, to-wit: on the 27th day of December, 1890, the said Western & Atlantic Railroad, together with its rights, ways and properties, was leased to the Nashville, Chattanooga, & St. Louis Railway, for the term of 29 years, then next ensuing, the said lessee Company becoming under the law a corporation of the State of Georgia, under the name and style of the Western & Atlantic Railroad Company, said lease being made pursuant to an act of the General Assembly, approved November 12th, 1889 (Acts of 1889, page 362), reference to which is hereby had. This contract of lease expired on the 27th day of December 1919.

5. Under and pursuant to an Act of the General Assembly of Georgia approved November 30, 1915, and amendments thereto, providing for the lease or other disposition of the Western & Atlantic Railroad, the said Western & Atlantic Railroad was again leased to said Nashville, Chattanooga & St. Louis Railway for a term of 50 years beginning December 27th, 1919, as evidenced by a certain contract of lease dated May 11, 1917, said contract of lease being, pursuant to the requirements of said Act, duly recorded on the minutes of the Executive Office of the State of Georgia as a public record, to which reference is hereby had.



[fol. 113] 6. Petitioners show that the defendant, the Western Union Telegraph Company, is maintaining and operating over, upon, and along the right of way of the Western & Atlantic Railroad between the City of Atlanta, Georgia, and the City of Chattanooga, Tennessee, telegraph lines, poles, wires and other appurtenances employed by it in the conduct of its telegraph business.

Petitioners further show that said use and occupation of said right of way is without authority from the State of Georgia, and is contrary to the will and consent of the Nashville, Chattanooga & St. Louis Railway, as lessee of the Western & Atlantic Railroad, and that the same constitutes an unlawful encroachment upon said right of way and an adverse use thereof.

7. Petitioner- further show and submit that the continued use of said right of way of the Western & Atlantic Railroad by the defendant, the Western Union Telegraph Company, is in derogation of the State's right and title thereto and operates adversely to the rights and interests of the lessee, the Nashville, Chattanooga & St. Louis Railway, in the full use and enjoyment of said right of way, and that said use and occupation being without warrant in law constitutes a continuing trespass and a constantly recurring grievance.

8. It is further shown unto the Court that the General Assembly of Georgia, adopted an Act approved November 30, 1915, creating the Western & Atlantic Railroad Commission for the purposes and with the powers and duties therein expressed; and that by an amendment to said Act approved August 4th, 1916, the said Western & Atlantic Railroad Commission was given full power and authority in its discretion to deal with and dispose of any and all encroachments upon and uses and occupancies of any part of the right of way and properties of the Western & Atlantic Railroad, whether such use or occupancy be permissive or adverse, and whether with or without claim of right therefor, and the Commission was further authorized and fully empowered to take such action as it might deem proper and expedient to cause the removal and discontinuance of any such use or occupancy, and to this end it was authorized and empowered to in- [fol. 114] stitute and prosecute in the name and behalf of the State of Georgia, such suits or other legal proceedings as it may deem appropriate in protection of the State's interest, or the assertion of the State's title.

Paragraph 14 of said lease contract of date May 11, 1917, expressly reserves to the State of Georgia the right to remove and caused to be discontinued any or all encroachments and other adverse uses and occupancies in and upon the right of way or other properties of the Western & Atlantic Railroad, or any part thereof, whether maintained under claim or right or otherwise, and to this end the Nashville, Chattanooga & St. Louis Railway, as lessee consented that the State may withhold delivery of possession, or right of possession, of such parts of the right of way and other properties as may be so adversely used and occupied until such encroachments and other adverse uses and occupancies shall have been removed or discontinued: and that the State of Georgia may, at its option, and in such manner

as it may deem best, proceed to remove such encroachments, uses and occupancies, acting therein in its own name and behalf as the owner of the property; it being further understood and agreed that the Nashville, Chattanooga & St. Louis Railway, if and when so requested, shall join with the State and become a party to such proceeding, judicial or otherwise. Pursuant to the authority and direction of said Act, and in accordance with Paragraph 4 of said lease contract, the said Western & Atlantic Railroad Commission at a meeting held on the 27th day of December, 1919, adopted a resolution authorizing and directing the counsel for the Commission, William A. Wimbish, to institute and prosecute in the name and behalf of the State of Georgia, such suits and legal proceedings as may be appropriate for the removal of said encroachment, and the discontinuance of such adverse use by the Western Union Telegraph Company, and providing that the Nashville, Chattanooga & St. Louis Railway, as lessee of the Western & Atlantic Railroad, shall join in such suits and proceedings.

In accordance with such authority and direction from the Western [fol. 115] & Atlantic Railroad Commission this suit is brought, and the Nashville, Chattanooga & St. Louis Railway as lessee of the Western & Atlantic Railroad, joins herein as a party complainant.

Wherefore, petitioners, invoking the exercise of the equitable jurisdiction of this Honorable Court, pray as follows, to-wit.

First. That the Court will render herein its judgment and decree declaring the defendant, *to* Western Union Telegraph Company, to be without lawful right or authority to use and occupy any portion of the right of way of the Western & Atlantic Railroad as and for the purpose hereinabove described, or any purpose whatever; and commanding the said Western Union Telegraph Company to forthwith cease and wholly desist from the said use and occupation to the end that the petitioners, the State of Georgia, and its lessee, the Nashville, Chattanooga & St. Louis Railway, may have and enjoy the full and unrestricted use and enjoyment of said right of way, free of any adverse claim of right thereto on the part of the Western Union Telegraph Company.

Second. That the defendant, the Western Union Telegraph Company, its officers, servants and agents severally and collectively, be perpetually enjoined from the use and occupancy of any part of the said right of way of the Western & Atlantic Railroad for the conduct of its business or the maintenance of any poles, wires, or structures employed in connection therewith, and from entry upon or the commission of any act or trespass on said right of way incident to or in connection with the operation and conduct of its business; and from in anywise disturbing or interfering with the free and unrestricted possession and use of said right of way by or in behalf of the State of Georgia, and its lessee, the Nashville, Chattanooga & St. Louis Railway.

Third. And the petitioners, seeking equity, offer to do equity and further pray that the injunction herein invoked may be granted upon

such terms as may appear to the Court to be just and equitable as between the parties with respect to the removal by said Western Union Telegraph Company of its wires, poles, structures and appurtenances from said right of way within such reasonable time [fol. 116] as may be limited by the court, and to the extent that this may be done without undue delay, and without injury to the freehold.

Fourth. That the petitioners may have such other, further and general relief as the facts of the case may warrant, and the Court shall deem consonant with the principles of equity and good conscience.

Fifth. That process may issue directed to the defendant, the Western Union Telegraph Company, commanding it to be and appear at the next term of this Honorable Court to answer this complaint, and abide the further order of the Court.

The State of Georgia, by William A. Wimbish, Its Solicitor and Counsel. Nashville, Chattanooga & St. Louis Railway, by Tye, Peoples and Tye, Its Solicitors and Counsel.

Jurat showing the foregoing was duly sworn to by Wm. A. Wimbish omitted in printing.

[File endorsement omitted.]

---

[fol. 117] STATE OF GEORGIA,  
County of Fulton:

[Title omitted]

SUMMONS AND SERVICE—Omitted in printing

---

[fol. 118] FULTON SUPERIOR COURT

[Title omitted]

ANSWER—Filed March 26, 1920

Now comes the Western Union Telegraph Company, hereafter sometimes styled the defendant, and answering the petition in the above cause says:

I. Answering the first paragraph of the petition, defendant admits that under and by virtue of an act of the General Assembly of Georgia entitled "An act to authorize the construction of a railroad communication from the Tennessee line, near the Tennessee river to the point on the southeastern bank of the Chattahoochee river, most eligible for the running of branch roads, thence to Athens,

Madison, Milledgeville, Forsyth and Columbus; and to appropriate monies therefor," approved December 21st, 1836, and the several acts amendatory thereof, the State of Georgia constructed "a railroad communication" known as the Western & Atlantic Railroad extending from the City of Atlanta in the State of Georgia through the Counties of Fulton, Cobb, Barton, Gordon, Whitfield and Catoosa, in the State of Georgia, and the County of Hamilton in the State of Tennessee, to the City of Chattanooga, Tennessee.

Defendant admits that the said Western & Atlantic Railroad was constructed out of public funds, but for lack of sufficient information [fol. 119] can neither admit nor deny that it was constructed solely out of public funds. The said act approved December 21st, 1836 provided for the issuance of stock for branch railroads mentioned in the act; and an amendatory act, approved December 23rd, 1837, provided that, for the purpose of procuring the necessary funds for the construction of the Western & Atlantic Railroad, commissioners appointed by the State of Georgia should from time to time sell and dispose of stock to be created on the credit of the State, to be issued and signed by the Governor and the President of the Board of Commissioner. For lack of sufficient information this defendant can neither state, nor admit, nor deny what stock, if any, was issued pursuant to the provisions of said statute, or what funds were raised upon stock, or the rights of persons holding such stock.

The said statute under which the Western & Atlantic Railroad was constructed and the acts amendatory thereof authorized the acquirement by the State of Georgia of such rights of way in, through and over lands as might be necessary for the construction and operation of that railroad. Pursuant to that authority, defendant believes that the State of Georgia did acquire, and now possesses, such easements or rights of way in, through and over lands upon which that railroad is now constructed as is necessary for the construction, maintenance and operation thereof, and that all or nearly all of such easements and rights of way will revert to the original land owners upon the discontinuance of said railroad and the operation thereof. Upon information and belief this defendant denies that the State of Georgia is the owner in fee simple of any of the land in, through, over and upon which the Western & Atlantic Railroad is constructed and operated, commonly known as the right of way of the Western & Atlantic Railroad.

Defendant admits that the State of Georgia is the owner of said Western & Atlantic Railroad and of said easements or rights of way necessary therefor, but expressly denies that either the lines of telegraph [fol. 120] graph of defendant upon, along or over said right of way, or the land taken therefor or the easements and rights of way in said land necessary for the construction, reconstruction, maintenance and operation thereof, belong to the State of Georgia; but on the contrary defendant alleges that said lines of telegraph hereinafter more particularly described, and the land taken therefor and said easements necessary therefor, are, and continuously for a long period of time have been, in exclusive and adverse possession of the Western Union Telegraph Company, which is the sole owner in fee simple thereof.

Defendant denies that the said Western & Atlantic Railroad, including its right of way and terminals, is owned by the State of Georgia in its sovereign or governmental capacity. On the contrary this defendant alleges that the State of Georgia embarked, pursuant to said statutes of Georgia, in the construction, maintenance and operation of a railroad, an enterprise usually carried on by individual persons or companies, and in so doing it waived, and has always waived, its sovereign character in respect to the ownership, construction, maintenance and operation of said railroad, and in respect to relations brought about or existing between itself as the owner, constructor, maintainer and operator of said railroad, on the one hand, and the public and third persons, on the other hand, and particularly in respect to this defendant and its predecessors in title in owning, possessing, constructing, maintaining and operating lines of telegraph and the easements necessary therefor upon and along said Western & Atlantic Railroad. In so embarking in the ownership and construction of, and in maintaining and operating said Western & Atlantic Railroad *with* directly or through any lessee, the said State of Georgia in respect thereto became, and at all times has been, subject to the laws and regulations applicable to, and binding upon, private persons, private corporations and ordinary railroad corporations, owning, constructing, maintaining and operating a railroad; and the State of Georgia assumed all the obligations and all of the liabilities incident to such [fol. 121] ownership and business when carried on by individuals; and this defendant and its predecessors in title acquired as against and from the State of Georgia, under grants and permits and contracts given or entered into by the State of Georgia with this defendant and its predecessors in title, and under the conduct and action or non-action of the State of Georgia, and by adverse use and possession by defendant and its predecessors in title of said lines of telegraph and the easements necessary thereof, the same rights and title which the Western Union Telegraph Company and its predecessors in title would have acquired and become possessed of under like grants, permits and contracts made by, and under like conduct, action and non-action of private persons, private corporations and ordinary railroad companies, and by like adverse use and possession against private persons, private corporations, and ordinary railroad corporations. The Supreme Court of the State of Georgia has so adjudicated and decreed in the case of Western & Atlantic Railroad vs. Carlton, 28 Ga. 180, and in Schofield vs. Georgia (as owner of Western & Atlantic Railroad) 54 Ga. 635. The Supreme Court of Tennessee has so held in Western & Atlantic Railroad Company vs. Taylor 6 Heisk 408, and in Hutchinson vs. Western & Atlantic Railroad Co. 6 Heisk 634.

Except as herein admitted the allegations of the first paragraph of the petition are denied.

II. Answering the second paragraph of the petition this defendant admits that the Nashville, Chattanooga & St. Louis Railway, a corporation of the State of Tennessee, pursuant to, and under the terms

and provisions of, an act of the General Assembly of Georgia, approved November 30th, 1915, and the acts amendatory thereof, entered into a lease-contract with the State of Georgia under which it became a body politic and corporate under the laws of Georgia under the name and style of the Western & Atlantic Railroad (hereinafter sometimes referred to as the present lessee), and under said lease-contract became the lessee of the said Western & Atlantic Railroad; but this defendant expressly denies that said present lessee under said lease contract or otherwise has acquired any right, title or interest whatsoever in or to the lines of telegraph now owned by [fol. 122] the Western Union Telegraph Company, hereinafter more fully described, or in or to the easement and rights in land necessary therefor; and defendant denies that said lines of telegraph and the easements and rights in land necessary therefor are included within, or are covered by, said lease-contract.

Except as herein admitted, the allegations of the second paragraph of the petitioner are denied.

III. Defendant admits the allegations of the third paragraph of the petition.

Defendant was incorporated in the State of New York in the year 1851 for the purpose of erecting, maintaining and operating lines of telegraph throughout the States and Territories of the United States and into other countries, and of transmitting and carrying over such lines of wire, as a public or common carrier, such messages as should be presented to it for transmission. Defendant, under and by virtue of its said charter and of the laws of New York, was at the times hereinafter mentioned, and now is, authorized to do and perform all of the acts and things for the purposes for which it was incorporated, to erect, maintain and operate lines of telegraph throughout the the United States and Territories and into other countries, to transmit and carry telegrams over such lines as a public or common carrier, to extend its line of telegraph, to construct branch lines to connect with its main lines, to unite with any other incorporated telegraph company, to purchase, lease and acquire such property, rights, franchises and privileges as might be convenient or necessary, and to acquire the property, rights, privileges and franchises of any telegraph company organized under, or created by, the laws of the State of New York or of any other State.

IV. Answering the fourth paragraph of the petition, defendant ad-[fol. 123] mits that pursuant to said statute of the State of Georgia, approved December 21st, 1836, an engineer and superintendent were appointed by the Governor of the State of Georgia whose duty it was to make surveys and contracts for the construction of said railroad, to contract with land owners for rights of way, and to condemn rights of way when the same could not be acquired by agreement, making reports — the Governor of the State of Georgia:

By an amendatory act approved December 23rd, 1837, a commission of three persons was appointed for the general *superendence* of the work of the Western & Atlantic Railroad whose duty it was,

with the advice of the chief engineer, to procure officers and agents and to establish such system, rules and regulations as would be conducive to construction with economical expenditures of the Western & Atlantic Railroad, to procure rights of way, and to report to the Governor of Georgia.

An act of the General Assembly of Georgia, approved December 4th, 1841, entitled, An Act to be entitled, an act to suspend operations on the part of the Western & Atlantic Railroad, and to provide for the execution of contracts on the part of the same, and for other purposes therein specified," repealed so much of the above mentioned act approved December 23rd, 1837, as relates to the appointment of commissioners for the Western & Atlantic Railroad, and authorized the Governor of Georgia to appoint a chief engineer and a disbursing agent who were authorized and directed, acting jointly, to discharge the duties previously exercised by said commissioners, subject to the decision of the Governor of Georgia in case of disagreement.

The General Assembly of the State of Georgia by an act entitled "An Act to authorize further progress upon the work of the Western & Atlantic Railroad and for other purposes therein specified, and to provide for a sale of said road, and for the employment of certain convicts thereon," approved December 22, 1843, provided that the [fol. 124] powers and authority which had previously been vested in the Commissioners of the Western & Atlantic Railroad, or in the Governor and Commissioners, or in the Chief Engineer and Disbursing Agent, or in the Governor and Chief Engineer, be vested in the Governor and Chief Engineer of said road, and that where the signature of either of the above named officers is authorized or required by laws or regulations previously of force, the signature of the Governor and Chief Engineer should thereafter be substituted therefor, and be in all respects equivalent thereto.

The said act approved December 22nd, 1843, further provided that it should be the duty of the Chief Engineer, under the direction of the Governor, to progress rapidly and economically with the completion of the said Western & Atlantic Railroad.

The General Assembly of the State of Georgia by an act entitled "An Act for the completion of the Western & Atlantic Railroad, and for providing funds for the same", approved December 23rd, 1847, made it the duty of the Governor of Georgia to have completed at the earliest practicable day the Western & Atlantic Railroad, and to cause the same to be equipped and used to the best advantage through its entire length from Atlanta to Chattanooga.

The General Assembly of Georgia by an act entitled "An Act to authorize the Governor to appoint additional engineers upon the Western & Atlantic Railroad, and for letting out the building and completion of said roads," approved December 30th, 1847, made it lawful for, and the duty of, the Governor of Georgia and the Chief Engineer of the Western & Atlantic Railroad to receive proposals for the completion of that railroad and expressly authorized the Governor of Georgia, with the concurrence of the Chief Engineer, to make a



contract with any person for the completion of said road upon such terms and restrictions as the Governor should prescribe, provided the Governor should deem the interest of the state to require such contract.

The General Assembly of Georgia adopted "An Act for the management of the Western & Atlantic Railroad," approved January 15th, 1852.

[fol. 125] This act made it the duty of the Governor of Georgia to appoint an officer to be styled the Superintendent of the Western & Atlantic Railroad whose duty would be to conduct all of the operations of the railroad connected with its construction, equipment and management. Said act expressly provided that said Superintendent of the Western & Atlantic Railroad "shall also contract for and purchase machinery, cars, materials, work shops, and all other things necessary and proper for the construction, repair and equipment of the road and its general working and business: but all contracts and expenditures which exceed the sum of five thousand dollars, shall be subject to the approval of the Governor. He shall also have power, by and with the consent of the Governor, to make contracts with the Government of the United States for schedules for running trains at such times, either by day or night, as they may deem expedient. He shall also have power, with the approval of the Governor, to settle all claims against the Western and Atlantic Railroad, and should any dispute arise concerning any claim which cannot be amicably settled, the claimant shall be authorized to bring suits in any of the Superior Courts of the several counties of this State through which the said road passes, against the Superintendent of the Western & Atlantic Railroad in his official character. The judgment which may be obtained, shall be against the said Superintendent in his official character, and shall be satisfied by him from the assets of said road, but shall not bind his person or individual property. The said Superintendent shall also have power to sue officially for any claim due the State on account of the said road."

The General Assembly of Georgia by an act entitled "An Act to approve, adopt and make of force in the State of Georgia a revised code of laws, prepared under the direction and by authority of the General Assembly thereof and for other purposes therewith connected" approved December 19th, 1860, adopted and made of force, [fol. 126] as the law of Georgia, a code of laws. The said code of laws, and particularly paragraph 889 thereof, provides that

"The State occupies the same relation to said road as owner, that any company or incorporation does to its railroad, and the obligations of the State to the public concerning said road, and of the public to said road, are the same as govern the other railroads of this State, so far as is consistent with the sovereign attributes of this State, and the laws of force for its conduct."

Paragraph 895 of the last named Code of Georgia (sub-paragraph 4) distinctly provides that the Superintendent of the Western & Atlantic Railroad "has authority—

"4. To contract for and purchase machinery, cars, materials, workshops and all other contracts necessary for the general working and business of said road not exceeding three thousand dollars, and over that amount subject to the approval of the Governor in writing.

"7. To settle all claims against said road, with the approval of the Governor.

"8. To sue officially for any claim due the State on account of said road, and defend all brought against the road."

Defendant admits that the Western & Atlantic Railroad was until the 27th day of December, 1870, operated by the State of Georgia in the manner and upon the conditions set forth in the foregoing acts, not in a sovereign capacity, but as herein above alleged in the capacity of a private person and subject to the same rules and laws as were applicable to the ownership and operation of a railroad by a private person or corporation, and as were applicable to contracts made by, and the conduct, action and non-action of, private persons or corporations owning and operating a railroad.

Defendant admits that, pursuant to an act of the General Assembly of Georgia, approved October 25th, 1870 (acts of 1870, page 423), the Western & Atlantic Railroad was leased to a corporation [fol. 127] known as the Western & Atlantic Railroad Company for a term of twenty years. This defendant denies that the lines of telegraph then upon, over and along the right of way of the Western & Atlantic Railroad, or the easements necessary for the construction, maintenance and operation thereof, were then owned by the State of Georgia or that they were covered by said lease. On the contrary, defendant alleges that said lines of telegraph and said easements necessary therefor had long previously been, and then and during the entire term of said lease and until the termination thereof and thereafter up to the present time were and are, possessed and owned exclusively and adversely by it, the Western Union Telegraph Company. This defendant has not a copy of said lease and requires proof thereof to be made.

Defendant admits that, pursuant to an act of the General Assembly of Georgia, approved November 12th, 1889 (acts 1889, page 362), the Western & Atlantic Railroad was for a term of twenty years beginning December 27th, 1890, leased to the Nashville, Chattanooga & St. Louis Railway, which by virtue of said act and lease then became a corporation under the law of Georgia under the name and style of the Western & Atlantic Railroad Company. This defendant denies that the lines of telegraph then upon, over and along the right of way of the Western & Atlantic Railroad, or the easements necessary for the construction, maintenance and operation thereof, were then owned by the State of Georgia, or that they were covered by said lease. On the contrary, defendant alleges that said lines of telegraph and said easements necessary therefor had long previously been, and then and during the entire term of said lease and until the termination thereof and thereafter up to the present time were and are, possessed and owned exclusively and adversely by it, the

Western Union Telegraph Company. This defendant has not a copy of said lease and requires proof thereof to be made.

Except as herein admitted the allegations of paragraph 4 are [fol. 128] denied.

V. Answering the allegations of paragraph 5 of the petition this defendant admits that pursuant to an act of the General Assembly of Georgia, approved November 30th, 1915, and the amendments thereto, the Western & Atlantic Railroad was leased for a term of 50 years beginning December 27th, 1919 to the Nashville, Chattanooga & St. Louisville Railway which under the provisions of said act and as said lessee became a corporation of the State of Georgia under the name and style of Western & Atlantic Railroad. This defendant denies that the lines of telegraph then upon, over and along the right of way of the Western & Atlantic Railroad, or the easements necessary for the construction, maintenance and operation thereof, were then owned by the State of Georgia, or that they were covered by said lease. On the contrary, defendant alleges that said lines of telegraph and said easements necessary therefor had long previously been, and then and during the entire term of said lease and, until the termination thereof and thereafter up to the present time were and are, possessed and owned exclusively and adversely by it, the Western Union Telegraph Company. This defendant requires proof to be made of said lease.

Except as herein admitted the allegations of the 5th paragraph of the petition are denied.

VI. Answering the allegations of the 6th paragraph of the petition this defendant admits that it is maintaining and operating over, upon or along what is known as the right of way of the Western & Atlantic Railroad between the City of Atlantic, Georgia and the City of Chattanooga, Tennessee telegraph lines, poles, wires and other appurtenances owned, possessed and employed by it in the conduct of its telegraph business, and it has continuously so owned, possessed, maintained and operated the same, together with the easements and interest in land necessary therefor, from the time of its acquisition [fol. 129] thereof on or about the 12th day of June, 1866 to the present time, and prior thereto its predecessors in title so owned, possessed, maintained and operated the same from the date of first construction about the year 1850 as hereinafter set forth. The said telegraph lines, poles, wires and appurtenances and the easements necessary therefor were at all times aforesaid continuously and adversely owned, possessed, used and occupied by defendant and its predecessors in title.

The said lines of telegraph and said easements and interests in land are situate upon or along the western side (left hand side going north) of said Western & Atlantic Railroad and its right of way, and may be generally described as follows:

One (1) main pole line of telegraph commencing in Fulton County, Ga., at or near the terminus of the Western & Atlantic Railroad in Atlanta, Ga. on the Western or left hand side going north

85

of said right of way, and extending thence northwardly, upon and along said western side of said right of way to a point about 1,947 feet north of Mile Post C-133; thence crossing over said right of way and railroad tracks to the eastern or right hand side going north of said right of way; thence extending northwardly upon or along the eastern or right hand side going north to a point about 8 feet north of Mile Post C-132; then crossing over said right of way and railroad tracks to the western or left hand side going north or said right of way; thence extending northwardly upon or along the Western or left hand side going north of said right of way to a point about 875 feet north Mile Post C139; thence crossing the railroad tracks and right of way of the Western & Atlantic Railroad to the eastern or right hand side going north of said right of way; thence northwardly upon or along the eastern or right hand side going north of said right of way to a point about 4,081 feet south of Mile Post C-38; thence crossing said right of way and railroad tracks to the western or left hand side going north of said right of way; thence northwardly upon or along the western or left hand side going north of said right of way to a point about 1,819 feet north of mile post C-7; thence crossing said right of way and railroad tracks to the eastern or right [fol. 130] hand side going north of said right of way and east of the tracks of the Cincinnati, New Orleans & Texas Pacific Railroad and in a general way paralleling said last named railroad tracks northwardly upon and along the eastern or right hand side going north of said right of way, and across said right of way and railroad tracks of the Western & Atlantic Railroad and entirely across said right of way near and just beyond where the line of tracks of the Cincinnati New Orleans & Texas Pacific Railroad crosses said right of way at or near Chattanooga, Tennessee; with the following pole lines branching out from the above described main line, to-wit:

(a). A pole line of telegraph extending from said main line of telegraph at a point about 1,915 feet north of Mile Post C-133 thence westwardly and northwestwardly along the line of the Southern Railroad tracks across and through said right of way.

(b). A pole line of telegraph extending from said main line of telegraph at or near Elizabeth Junction thence eastwardly across through and over said right of way and railroad tracks and along the line of the L. & N. Railroad which goes to Blue Ridge.

(c). A pole line of telegraph extending from said main line of telegraph near Phelps and thence extending southwestwardly across and through said right of way and along the line of the tracks of the Southern Railway.

(d). A pole line of telegraph extending from said main line of telegraph at a point about 3,707 feet south of Mile Post C-38 thence northeastwardly along the line of the tracks of Southern Railway across and through said right of way.

(e). A pole line of telegraph extending from said main line of

telegraph at a point about 1,819 feet north of Mile Post C-7 thence northeastwardly through and across said right of way along the line of the tracks of the Cincinnati, New Orleans and Texas Pacific Railroad.

(f). A pole line of telegraph extending from said line of telegraph near the Citico Test House of the Western Union Telegraph Company near the tracks of the Southern Railway thence southwestwardly [fol. 131] across, through and over said right of way and railroad tracks nearly parallel with the railroad tracks of the Southern Railway.

Said main line of telegraph consists of poles securely and permanently planted or embedded in and affixed to the land, and may be generally described as follows, to-wit:

One (1) pole line of telegraph upon or along the said Western & Atlantic Railroad and its right of way, consisting of poles situate on the average about twenty two (22) feet from the nearest rail of the main line track of the Western & Atlantic Railroad, the distance of said poles from said tracks varying from approximately fourteen (14) feet to thirty five (35) feet, there being about forty-five (45) poles per mile, averaging about one hundred and seventeen (117) feet apart between the initial point of said pole line of telegraph in Fulton County, Ga., and Kingston in Bartow County, Ga., and there being about thirty (30) poles per mile averaging about one hundred and seventy six (176) feet apart from Kingston, Ga., to Chattanooga, Tenn., with cross arms about eight (8) feet long at or near the tops of said poles supporting and sustaining thereon telegraph wires, the number of telegraph wires so supported varying from about six (6) wires to thirty (30) wires; the number of cross arms varying from one (1) to six (6).

Where the line of said railway is straight, the poles of defendant telegraph lines are perpendicularly set in the ground, but at curves the poles are placed in the ground in a slanting or inclined position in such manner that the top of the pole is farthest removed from the center of curvature, and to offset the strain incident to the curvature, the poles are sustained or reenforced by guy or stay wires, one end of which is securely fastened to a post or other anchor securely fixed in the ground and about seven (7) feet more distant from the center of curvature than the bottom of the pole; the distance of such post or anchor from the bottom of the pole is as a rule at least one fourth ( $\frac{1}{4}$ ) the length of the pole above ground.

At places of curvature poles are also strengthened, braced or re- [fol. 132] enforced by wooden braces, one end of which is securely fastened to the pole near the top and the other end is securely embedded or planted in the ground about seven (7) feet nearest the center of curvature than the base of the pole.

Poles are sometimes sustained, reenforced or strengthened by both guy or stay wires and braces of the character above mentioned and

sometimes by one of such braces, supports or reinforcements without the other.

Certain poles are also strengthened or reinforced by what are termed storm or head guys or stays, being braces guys or stays of the character above mentioned fastened at the base to posts or other anchors in the ground and at the same distance generally from the center of curvature (or track of straight) as the base of the pole but placed at distances from the pole to which the other end of the brace, stay or guy is attached dependent upon the amount of possible strain to which the pole may be subject, the anchor being at times forty (40) feet or more from the base of the pole supported or reinforced by the guy or braces.

From the northern terminus, to the southern terminus of said telegraph line upon or along said right of way, there are on the average about seven (7) poles per mile in each of said lines of poles, braced, reinforced or stayed in the manner above mentioned.

There have long been and are now, established and maintained by defendant along said line of telegraph many offices, stations or depots at which messages have long been and now are received by this defendant from the public for transmission and delivery at other points, and at which messages transmitted from other points have been received for delivery and have been delivered by this defendant.

The above mentioned pole lines of telegraph extending from said main line of telegraph is of substantially the same character and construction as said main line of telegraph.

The mile posts above mentioned are those of the Western & Atlantic Railroad giving the distances from Chattanooga.

The said easements possessed, maintained, used and operated by [fol. 133] the Western Union Telegraph Company and its predecessors in title for and in connection with the above described lines of telegraph may be generally described as irrevocable, perpetual and assignable easements or rights in upon, through, over and across the Western & Atlantic Railroad and its right of way on the western side (left hand side going north) of said railroad and its right of way.

(a) For the construction, maintenance and operation of said telegraph lines upon, along or over the said western side (left hand side going north) of the Western & Atlantic Railroad and its right of way.

(a) *For the construction, maintenance and operation of said telegraph lines upon, along or over the said western side (left hand side going north) of the Western & Atlantic Railroad and its right of way.*

[fol. 134] (b) To construct, erect, maintain and operate its said lines of telegraph upon, along, over under or through the land upon, under, along, over or through which the same are now situate.

(c) To place, erect and maintain the telegraph poles now in said lines of telegraph, and each of them, and to replace the same, and



each of them, when necessary, and to place, erect and maintain such additional telegraph poles as may from time to time become necessary for the proper operation and maintenance of said telegraph lines, firmly embedded in the earth where now situate or where it may be necessary to place additional poles, and to brace, strengthen and support said poles, and each of them, with wires, stays or poles where such wires, stays or poles are now situate or may now be anchored and fastened securely to the earth or structures in substantially the manner in which the same now exist as hereinabove described, and with such additional wires, stays, poles and anchors as may from time to time become necessary for the maintenance and operation of said lines of telegraph, and each of them, and to place upon said telegraph poles such cross arms as now exist or as may from time to time become necessary for the maintenance and operation of said lines of telegraph, and each of them, and to place upon said telegraph poles such cross arms as now exist or as may from time to time become necessary for the proper maintenance and operation of said telegraph lines, and each of them, and to place, construct and maintain upon such poles and cross arms such fixtures and such telegraph wires and cables as now are located thereon or as may from time to time become necessary for the proper maintenance and operation of said telegraph lines, and each of them.

(d) To place its telegraph wires and fixtures upon the buildings and structures of said defendant where the same are now placed or attached or where it may from time to time hereafter become necessary to place or attach the same in order to properly maintain and [fol. 135] operate said telegraph lines, and each of them.

With the right in the Western Union Telegraph Company, its successors and assigns, from time to time as may be reasonably necessary, to add additional poles, braces, stays, supports, cross arms, wires and fixtures of the same or different dimensions as those now in said line of telegraph, and at all times to maintain, construct, reconstruct and operate said lines of telegraph and easements.

Defendant denies that the use and occupation of said right of way and the possession and enjoyment of the easements and interest in land above described necessary for the construction, reconstruction, maintenance and operation of said lines of telegraph is without authority from the State of Georgia. This defendant further denies that the same constitutes an unlawful encroachment upon the right of way of the Western & Atlantic Railroad. On the contrary, defendant alleges that the State of Georgia has given and granted to this defendant and its predecessors in title under and through whom defendant claims, full power and authority to construct, reconstruct, maintain and operate in perpetuity said lines of telegraph upon, along, in, over and through said right of way; and the State of Georgia has granted and given to this defendant, and also to its predecessors in title under and through whom defendant claims, the easements and interest in said right of way and land above described necessary and useful for the construction, reconstruction, mainte-



nance and operation in perpetuity of said lines of telegraph.

The permits and grants aforesaid from the State of Georgia to the predecessors in title of this defendant, the conveyances from such predecessors in title under which this defendant claim to be possessed of such easements, and the grants and permits from the State of Georgia to this defendant itself are:

(1) An act of the General Assembly of the State of Georgia [fol. 136] approved December 29th, 1847, entitled "An Act to authorize the construction of the Magnetic Telegraph, and providing for the protection of the same," granting any company or individual the right to construct and operate lines of telegraph upon any public road or highway in the State.

The Western & Atlantic Railroad is a "public road or highway in this State;" is within the provisions of said act; and by said act the State of Georgia gave and granted all telegraph companies, including defendant and its predecessors in title, the right to construct, maintain and operate without limit lines of telegraph upon and along the said Western & Atlantic Railroad which defendant and its predecessors in title have done as herein alleged, and they and each of them thereby acquired perpetual, irrevocable and assignable easements for the construction, maintenance and operation of the lines of telegraph so constructed, maintained or operated by each of them respectively thereon.

(2) The State of Georgia has declared that its public policy is, and that for the public welfare it is necessary, that lines of telegraph should be constructed upon and along the railroad highways, and railroad rights of way in the State of Georgia. That declaration of public policy and of public necessity has been expressed by the Legislature of the State of Georgia in and by the aforesaid act of December 29th, 1847, and in and by the acts of the General Assembly of Georgia entitled and approved, respectively as follows:

"An Act to empower and authorize telegraph companies in this State to construct their lines upon the right of way of the several railroad companies in this State," approved August 26th, 1872;

"An Act to empower and authorize telegraph companies in this State to construct, maintain and operate their lines upon the right of way of the several railroad companies of this State," approved January 28th, 1873;

[fol. 137] "An Act to encourage and authorize the construction of telegraph lines in the State of Georgia, and conferring certain privileges and powers on the owners, and for other purposes," approved September 12th, 1889;

"An Act to encourage and authorize the construction of telegraph lines in the State of Georgia, and conferring certain privileges, powers and penalties on the owners thereof and to provide a penalty for divulging the contents of any private message by any person connected with such telegraph company," approved November 12th, 1899;

And in and by the rules of the Georgia Railroad Commission adopted January 7th, 1892 and in the year 1901 expressly prohibiting the closing, removal, suspension, discontinuance or abolishing of any established telegraph office or station without authority first granted by the Georgia Railroad Commission upon written application filed with it. To these rules the said Georgia leasing act of November 30th, 1915, expressly subjects said present lessee.

The State of Georgia in and by said acts gave and granted defendant the right to construct, maintain and operate said lines of telegraph in perpetuity upon and along said Western & Atlantic Railroad.

(3) On October 10th, 1850, Garst & Bean who proposed to organize a corporation and to build a telegraph line from Atlanta to Nashville, which was subsequently made to embrace the Georgia Railroad and to extend to Augusta, made known such proposal to the Chief Engineer of the Western & Atlantic Railroad, and at the same time expressed a desire to procure the aid of the Western & Atlantic Railroad in the construction of a line of telegraph by a corporation to be called the Augusta, Atlanta, & Nashville Magnetic Telegraph Company.

Thereupon W. L. Mitchell, the Chief Engineer of the Western & Atlantic Railroad, on October 11th, 1850 wrote Garst & Bean a letter, copy of which is hereto attached as Exhibit 1, offering to grant to said Garst & Bean for purposes mentioned an easement on the right [fol. 138] of way of the Western & Atlantic Railway without limit and perpetual in its nature. Said proposition and offer was accepted by Garst & Bean on October 11th, 1850. Thereupon the said Chief Engineer of the Western & Atlantic Railroad issued instructions for the carrying out of the contract so made.

Thereafter by an act of its General Assembly approved January 27th, 1852, the State of Georgia incorporated the Augusta, Atlanta & Nashville Magnetic Telegraph Company for the purpose of doing the business of a telegraph company from Augusta, Georgia through Atlanta to the City of Nashville, Tennessee, with the usual powers of corporations, including the power to purchase, hold, sell and convey property. In and by said act the State of Georgia expressly ratified and affirmed the said contract entered into between the said William L. Mitchell, Chief Engineer of the Western & Atlantic Railroad, and G. W. Garst and J. M. Bean on the part of said Augusta, Atlanta & Nashville Magnetic Telegraph Company, and further expressly enacted in said act.

"That the Augusta, Atlanta & Nashville Magnetic Telegraph Company, shall have power and authority to set up their fixtures along and across any high road or high roads; and any railroad which now or may hereafter belong to this State and any waters or water courses of this State."

Under and by virtue of said contract and statute, the first line of telegraph upon and along the Western & Atlantic Railroad was constructed, established and operated, and the Augusta, Atlanta & Nash-

ville Magnetic Telegraph Company was thereby granted, and acquired, perpetual, irrevocable and assignable easements for the construction, maintenance and operation thereof.

(4) On information and belief, defendant alleges that during or about the year 1858 all of the telegraph lines properties and easements of the Atlanta, Augusta & Nashville Magnetic Telegraph Company were sold, conveyed and delivered by that corporation, or under and by virtue of levy and judicial sale to Alvin D. Hammett of [fol. 139] Marietta, Georgia, and to George L. Willy of Nashville, Tennessee. Because of the loss of original papers and the destruction of county records during the Civil War between the years 1861 and 1865, defendant is unable to attach copies of the conveyances of said properties to said Hammett and Willy.

(5) On the 12th day of August, 1858 said Alvin D. Hammett executed and delivered to William S. Morris, et al. a deed conveying all of said telegraph lines, properties and easements formerly belonging to the Augusta, Atlanta & Nashville Magnetic Telegraph Company from Chattanooga in the State of Tennessee to Augusta in the State of Georgia, copy of which is hereto attached as Exhibit 2.

(6) On the first day of September 1858, the said Alvin D. Hammett conveyed to said William S. Morris et al. all of the telegraph lines, properties and easements formerly belonging to the Augusta, Atlanta & Nashville Magnetic Telegraph Company, and particularly those situate upon or along the Western & Atlantic Railroad from the City of Atlanta to the dividing line between the States of Georgia and Tennessee, a copy of which is hereto attached marked Exhibit 3.

(7) On the 13th day of November, 1858, the said George L. Willy conveyed to William S. Morris et al. all of the telegraph lines, properties and easements formerly belonging to the Augusta, Atlanta & Nashville Magnetic Telegraph Company in the State of Tennessee extending from the City of Chattanooga upon or along the Western & Atlantic Railroad to the dividing line between the States of Georgia and Tennessee, copy of which is hereto attached marked Exhibit 4.

(8) On the 28th day of December, 1859, said William S. Morris et al. conveyed to the American Telegraph Company all of the telegraph lines, properties and easements acquired by them as aforesaid extending from the City of Chattanooga in the State of Tennessee to Atlanta in the State of Georgia, copy of which conveyance is hereto attached marked Exhibit 5.

[fol. 140] (9) On June 12th, 1866, the American Telegraph Company assigned, transferred and conveyed to your orator the said lines of telegraph, properties, easements and rights which it possessed upon or along the right of way of the Western & Atlantic Railroad, copy thereof is hereto attached as Exhibit 6.

(10) By a contract dated August 18th, 1870, between the Western Union Telegraph Company and the Western & Atlantic Rail-

road executed in behalf of the Western & Atlantic Railroad by its Superintendent and approved by the Governor of Georgia under the seal of the State, the State of Georgia granted and conveyed to the Western Union Telegraph Company a "perpetual right of way to erect and maintain telegraph lines along said railroad of as many wires as it may deem necessary to its business, and additional lines of poles whenever" the Western Union Telegraph Company shall so elect.

The preamble of said contract recites that the agreement was entered into "in order to provide necessary telegraph facilities for the party of the second part (W. & A. R. R.) and to a better understanding of the terms on which the party of the first part (W. U. T. Co.) shall occupy the line of railroad of the party of the second part with the line or lines of telegraph wires belonging to the party of the first part, and to permanently settle and define the business relations between the respective parties hereto." A copy of said contract is hereto attached as Exhibit 7.

After the lease of the Western & Atlantic Railroad made by the State of Georgia in the year 1870, as above alleged, the then lessee, the Western & Atlantic Railroad Company, after entering into possession of said Western & Atlantic Railroad, and after enjoying the benefits of said contract of August 18th, 1870 between the State of Georgia and defendant, refused to pay defendant for services rendered by it to that lessee in accordance with the provisions of said contract of August 18th, 1870. Said Western & Atlantic Railroad Company claimed that the State of Georgia was the owner of one wire in defendant's lines of telegraph, and that it, as said lessee, was [fol. 141] entitled to the possession and use thereof, declared that it had never accepted or become a party to the said contract of August 18th, 1870, was not bound by its provisions and refused to comply therewith. Thereupon defendant brought suit against said Western & Atlantic Railroad Company in the United States District Court for the Northern District of Georgia in the year 1872 to recover money which it claimed was due it by said Western & Atlantic Railroad Company, and for the use of said wire and for services which it had rendered in accordance with the provisions of said contract of August 18th, 1870, to restrain the Western & Atlantic Railroad Company from interfering with said wire, from putting it to a use not authorized by said contract of August 18th, 1870, and from withholding from the Western Union Telegraph Company the said wire claimed by the Western & Atlantic Railroad Company as said lessee, and for other equitable relief.

To the petition filed in said suit the Western & Atlantic Railroad Company filed its answer; denied that it had participated in the execution of said contract of August 18th, 1870; denied that it had accepted, or in any manner become bound by, that contract; claimed that one of the wires in the lines of the Western Union Telegraph Company along the Western & Atlantic Railroad and certain instruments, batteries and fixtures had been purchased by, and belonged to, the State of Georgia, and that the State of Georgia had delivered possession thereof to the Western & Atlantic Railroad Company as

lessee aforesaid; and that as said lessee, the Western & Atlantic Railroad Company, was entitled to the exclusive possession and use of said wire instruments, batteries and fixtures, it was not liable to the Western Union Telegraph Company for any charges for the use and enjoyment thereof.

A judgment was rendered in the United States District Court for the Northern District of Georgia sustaining the claim of the Western & Atlantic Railroad Company and dismissing the bill filed by the Western Union Telegraph Company. The Western Union Telegraph Company entered an appeal to the Supreme Court of the United States, which, in a decision in said case reported in 91 U. S. 283, adjudged that said wire, instruments, batteries and fixtures claimed as aforesaid by the Western & Atlantic Railroad Company, had not been purchased by and did not belong to the State of Georgia, but was the property of the Western Union Telegraph Company, for the use of which by the Western & Atlantic Railroad Company the Western Union Telegraph Company was entitled to compensation. The Supreme Court of the United States therefore reversed the decree of the Circuit Court with direction that the case be referred to a master to state an account on the terms of the contract of August 18th, 1870, as between the Western Union Telegraph Company and the Western & Atlantic Railroad Company for the term that the latter had used the wires, batteries and equipments, and to render a decree for that amount. A mandate was thereupon issued and transmitted to, and made the judgment of, the United States Circuit Court. Thereafter the Western Union Telegraph Company and the Western & Atlantic Railroad Company adjusted the differences between themselves and settled said suit and the easements therein, as is set forth in a receipt for the sum of Four Thousand Dollars (\$4,000.00) executed and delivered by the Western Union Telegraph Company and the Western & Atlantic Railroad Company, dated September 11th, 1876, and a resolution of the Executive Committee of the Western & Atlantic Railroad at a meeting held September 11th, 1876. Copies of said receipt and of said resolution are hereto attached as exhibits 8 and 9 respectively.

By a resolution approved October 22nd, 1887 (Georgia laws 1887, page 911), the General Assembly of Georgia requested the Governor of the State to instruct the Attorney General to examine into the facts and circumstances of the said contract of August 18th, 1870; and further thereby instructed the Attorney General, in the event it should appear that good grounds existed to authorize the rescinding of said contract, to institute proceedings to that end. [fol. 143] Notwithstanding said resolution no action has ever been instituted by any attorney general of Georgia, nor has any proceeding or action been instituted by or on behalf of the State of Georgia, to rescind said contract or involving the same until the institution of this suit. Defendant alleges that no good ground did in fact exist for rescinding said contract or for instituting any action or proceedings conditionally authorized by said resolution. In any event the State is now barred by its laches and by the statutes of

limitation from questioning the validity of said contract or from instituting the present suit or any proceeding whatever whereby or wherein the validity of that contract may be involved or questioned.

In further denial of the allegation of the petition, and particularly paragraph 6 thereof, that defendant's use and occupation of said right of way of the Western & Atlantic Railroad is without authority from the State of Georgia and constitutes an unlawful encroachment thereon, this defendant alleges that its said use and occupation is authorized and is lawful not only by reason of the facts hereinabove set forth, but because of and under the following facts:

(11) The General Assembly of the State of Georgia by an act entitled "An Act limiting the time in which suits in the Courts of law in this State must be brought, and also limiting the time in which indictments are to be found and prosecuted in certain cases, and for other purposes therein mentioned," approved March 6th, 1856, provided and enacted:

"Section I. The General Assembly of the State of Georgia do enact as follows: All suits for the recovery of real estate shall be brought within seven years after adverse possession commences, and not after. But no possession shall be considered adverse unless evidenced by written evidence of title, nor shall any forged or fraudulent title be evidence of a- adverse possession.

"Section III. All suits for trespasses upon or damages to real [fol. 144] estate shall be brought within four years after the right of action accrues and not after.

"Section XI. All suits brought upon bonds or other instruments, under seal, shall be brought within twenty years after the right of action accrues, and not after, but no instrument shall be considered sealed unless so recited in the body of the instrument.

"Section XII. All suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within twenty years after the right of action accrues, and not after.

"Section XXXVIII. That when by the provisions of this act a private person would be barred of his rights, the State shall be barred of her rights under the same circumstances.

"Section XXXIX. And be it further enacted, that this act shall in none of its provisions interfere with the principles established in the Court of Equity in relation to laches or stale demands, or the equitable bars in cases brought to said courts."

The foregoing provisions of said statute are substantially embodied in paragraphs 4369 and 4371 of the present code of the State of Georgia.

The General Assembly of the State of Georgia by joint resolutions approved December 19th, 1893 (Georgia Laws 1893, page 501), and approved December 18th, 1894 (Georgia Laws 1894, page 283), fur-



ther recognized and provided that adverse possession of land, rights, ways and properties of the Western & Atlantic Railroad would ripen into, and would constitute, good title thereto, and would bar the State of Georgia from any claim in land, rights, ways and properties so adversely held and used by any person, including the Western Union Telegraph Company, whenever under like circumstances and adverse possession good title would be acquired against a private person, and whenever under like circumstances and adverse possession a private [fol. 145] person would be barred from claiming land, rights, ways and properties. Said resolutions further provide that "a settlement of each and every case of encroachment, adverse claim, occupation or right held against the interest of the State" shall be effected "in such a manner and on such terms as will be fair and equitable," and that any judgment or decree rendered in "finally determining any and all matters of controversy, issues, both of law and fact between the State of Georgia and any person or persons affecting or relating to the Western & Atlantic Railroad, its rights, ways and properties," "shall be so moulded in each case as to establish and give effect to all the rights and equities of the parties in the subject matter."

The State of Georgia was authorized to extend and construct the Western & Atlantic Railroad from the northern boundary line of Georgia to its present terminus at Chattanooga, Tennessee, and to acquire such rights of way, easements, and interest in land in the State of Tennessee as might be necessary therefor, not in its sovereign capacity, but only in the capacity of, and only with the rights of, and subject to all burdens and limitations imposed by law or equity upon, a private person or ordinary railroad company, and subject to all statutes of the State of Tennessee relating to prescriptive title, to adverse possession, and to limitation upon the right to sue.

By the following legislative enactments of the General Assembly of the State of Georgia above mentioned and by:

The above mentioned Act approved December 23rd, 1837 (Georgia Laws 1837, page 210).

A Resolution approved December 29th, 1838 (Georgia Laws 1838, page 231).

An Act approved December 25th, 1847 (Georgia Laws, 1847, page 300).

An Act approved December 23, 1847 (Georgia Laws 1847, page 172).

And by the following enactments of the General Assembly of Tennessee [fol. 146] nessee:

An Act of the General Assembly of the State of Tennessee passed January 24th, 1838, referred to in the last mentioned Georgia Act.

An Act of the General Assembly of Tennessee (Tennessee Acts 1837, page 319), copy whereof is hereto attached as Exhibit 10.

An Act of the General Assembly of Tennessee passed in 1847 (Tennessee Acts 1847, chapter 195), copy whereof is hereto attached as Exhibit 11.

The State of Tennessee has enacted statutes providing:



(a) That continuous adverse, use and possession of land and of any easement therein under a claim of right for a period of twenty years raises the legal presumption of a grant or conveyance, and the person so using and possessing land or easements therein acquires a good title thereto.

(b) That no person, or any one claiming under him, shall have any action either at law or in equity for any lands, tenements, or hereditaments but within seven years after the right of action accrued. Prior to the year 1895 adverse possession for seven years though without any deed gave indefeasible title and barred and defeated the right of action by any claimant. In the year 1895 the General Assembly of the State of Tennessee amended the last mentioned law by providing that to support an affirmative action there must be a recorded deed or grant. So amended said statute has been of force since the year 1895, and a copy thereof is hereto attached as Exhibit 12.

The Augusta, Atlanta and Nashville Magnetic Telegraph Company, from the time of the first construction of the telegraph lines as aforesaid upon or along the right of way of the Western & Atlantic Railroad until the transfer and conveyance of those lines of [fol. 147] telegraph and the perpetual easements therefor above mentioned to its successor in title as hereinabove alleged, was, during all of said time, in possession of said lines of telegraph and easements; said possession did not originate in fraud and was public, continuous, exclusive, uninterrupted, peaceable, actual and adverse to the State of Georgia and to all persons whomsoever owning or having any interest in the land upon, over, through, across or along which said lines of telegraph and easements were located and were situate, and was accompanied by a claim of right, and particularly by the claim of right under the written title and color of title of the aforesaid contract between the State of Georgia and Garst & Bean and of the Act of the State of Georgia above alleged, approved January 27th, 1852, incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company.

Thereafter each successor in title to the said Augusta, Atlanta & Nashville Magnetic Telegraph Company, from the time it acquired title to said telegraph lines, properties and easements upon or along the Western & Atlantic Railroad until the time it transferred, assigned and conveyed the same to its successors in title as above set forth, was in possession of said lines of telegraph, properties and easements; said possession did not originate in fraud and was public, continuous, exclusive, uninterrupted, peaceable, actual and adverse to the State of Georgia and to all persons whomsoever owning or having any interest in the land upon, over, through, across or along which said lines of telegraph and easements were located and were situate, and was accompanied by a claim of right, and particularly by the claim of right under the written title and color of title of the aforesaid contract between the State of Georgia and Garst & Bean and of the act of the State of Georgia above alleged, approved January 27th,

1852, incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company, and also by the claim of right under the written title and color of title to itself herein above alleged, and also by the claim of right under the written title and color of title of each of its predecessors in title as herein above set forth.

At the time of the above mentioned transfer and conveyance to it by the American Telegraph Company in the year 1866 the Western Union Telegraph Company became seized and possessed and entered into the exclusive possession of lines of telegraph, properties and easements above described situate on the western side (or left hand side going north) of the Western & Atlantic Railroad and its right of way, which said lines of telegraph, properties and easements are hereinafter more fully described and are the same as were and are covered by the aforesaid contract between the Western & Atlantic Railroad and Garst & Beart, the act of the General Assembly of Georgia incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company, approved January 27th, 1852, by each of the conveyances and muniments of title herein above alleged in this paragraph (VI) of this answer, and by the above mentioned agreement between the Western & Atlantic Railroad and the Western Union Telegraph Company, dated the 18th day of August, 1870 (copy of which is hereto attached marked Exhibit 7), in and by which last named agreement the State of Georgia gave and granted the Western Union Telegraph Company perpetual easements and rights of way for the erection, maintenance and operation of lines of telegraph (including in particular said lines of telegraph above described upon or along the western side of the Western & Atlantic Railroad and its right of way) "of as many wires as it (the Western Union Telegraph Company) shall so elect."

The said possession by the Western Union Telegraph Company of the said telegraph lines upon or along the western side (left hand side going north) of the Western & Atlantic Railroad and its right of way, hereinabove more particularly described, commenced as hereinbefore stated upon the transfer, conveyance and delivery thereof to it by the American Telegraph Company in the year 1866 as herein [fol. 149] above alleged, and has continued in the Western Union Telegraph Company to the present time. Said possession by the Western Union Telegraph Company of said lines of telegraph, properties and easements upon or along the western side (left hand side going north) of the Western & Atlantic Railroad and its right of way did not originate in fraud and was public, continuous, exclusive, uninterrupted, peaceful, actual and adverse to the State of Georgia and to all persons whomsoever owning or having any interest in the land upon, over, through, across or along which said lines of telegraph and easements were located and were situate; and was accompanied by a claim of right, and particularly by the claim of right under the written title and color of title of the aforesaid contract between the State of Georgia and Garst & Bean, under the act of the State of Georgia above alleged approved January 27th, 1852, incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company, under each of the mortgages, conveyances and muniments of title

herein above alleged in this paragraph (VI) of this answer, and under the above mentioned agreement between the Western & Atlantic Railroad and the Western Union Telegraph Company, dated the 18th day of August 1870 (copy of which is hereto attached marked Exhibit 7).

(12) The Constitution of the United States (Art.1, Sec. 8) empowers Congress—

“(3) To regulate commerce with foreign nations and among the several states and with the Indian tribes.

“(7) To establish post-offices and post roads.

“(10) To declare war.

“(11) To raise and support armies.

“(12) To provide and maintain a navy.

“(14) To provide for calling forth the militia to execute the laws of the Union, to suppress *resurrections*, *impel* invasions.

“(15) To provide for organizing, arming and disciplining the militia.

[fol. 150] “To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States and in any department or officer thereof.”

Pursuant to the power given it, the Congress of the United States on July 7th, 1838, enacted that each and every railroad within the limits of the United States, then or thereafter completed, should be a post route and post road, and by subsequent acts, and particularly the act of March 3rd, 1853, and the act of June 8th, 1872, enacted that all railroads or parts of railroads then or thereafter in operation were established post roads.

In the exercise of the large discretion as to the means to be employed by it in the exercise of these powers to accomplish the objects and results for the accomplishment of which these powers were bestowed upon it, to facilitate interstate commerce, to aid in the construction of telegraph lines (an instrument of such commerce) and to secure to the Government of the United States the use of telegraph lines for postal, military and other purposes, the Congress of the United States on the 24th day of July, 1866 passed an act entitled “An Act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes, “which, with the amendments thereto, are now embodied in the Revised Statutes of the United States, Chapter 65, Paragraphs 5263–5269; and therein and thereby Congress enacted that any telegraph company then, or thereafter, organized under the laws of any State of the United States should have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which had been, or might thereafter be, declared such by an act of Congress, and over, under or across the navigable streams or waters of the United States, [fol. 151] and bestows other rights and privileges; provided that

before any telegraph company should exercise any of the powers or privileges conferred by said act, such company should file its written acceptance with the Postmaster General of the restrictions and obligations required by said act.

Said statute of the United States imposed upon any telegraph company accepting its provisions contractual and statutory obligations, including the obligation to transmit telegrams between the several departments of the Government and other officers and agents over its lines of telegraph with priority over all other business and at such rates as the Postmaster General shall annually fix; and with the further obligation to sell all of its lines of telegraph to the United States whenever the United States might desire to purchase the same. For failure to fulfill the duties and obligations imposed by such accepted statute, the said statute imposes severe pains and penalties.

On or about the 8th day of June, 1867, defendant filed its written acceptance with the Postmaster General of the United States of the restrictions and obligations of said act, a copy of which acceptance is attached hereto as Exhibit 13, and to it express reference is prayed.

This defendant does not claim that the said statute of the United States, often referred to as the Post Roads Act, in and of itself authorized this defendant against the will of the State of Georgia owning the Western & Atlantic Railroad right of way, or without adequate compensation paid or tendered under due process of law, to enter upon the Western & Atlantic Railroad right of way or properties, or to construct maintain and operate thereon telegraph lines, and to use, enjoy and possess easements in said Western & Atlantic Railroad right of way necessary for said lines of telegraph; but this defendant does claim and assert that the State of Georgia, in giving and granting to its predecessors in title perpetual and assignable [fol. 152] easements (acquired as hereinabove alleged by this defendant), and in giving and granting to this defendant perpetual easements in and by the aforesaid contract with the State of Georgia of August 18th, 1870, and by its conduct and statutes permitting this defendant by its adverse use and occupation, and through the laches, action and non-action of the State of Georgia, to acquire perpetual easements for said lines of telegraph upon said right of way of the Western & Atlantic Railroad, assented to, and made it lawful and permissible for the Western Union Telegraph Company to make with the United States by the contract entered into as above stated by defendant's acceptance of the said statute of the United States. Having permitted and assented to that contract, the State of Georgia permitted the Western Union Telegraph Company to contract with the United States, for, and to obtain from it, the benefits, properties, rights of way and privileges by that act granted, and assented to and made it lawful for the Western Union Telegraph Company to assume, and to bind itself for the fulfillment of, the obligations imposed and created by said act of Congress.

This defendant having, as herein alleged, obtained by adverse possession full right and title to the perpetual easements occupied,

used and possessed by it for its said lines of telegraph upon and along said Western & Atlantic Railroad; and having obtained from or under the State of Georgia, as herein alleged, full right and title to said easements, and the right to enter into the contract with the United States created by the acceptance of said act of Congress; and having acquired the right and permit granted by Congress to maintain and operate its lines of telegraph upon and along that post road known as the Western & Atlantic Railroad; this defendant claims a full and complete title to said easements in perpetuity has been acquired by it, and that a part or increment of said title is the grant and permit to defendant under and by said accepted act of Congress.

[fol. 153] This defendant admits that its use and occupation of said right of way, and the possession, maintenance and operation of said lines of telegraph and of said easements necessary and useful therefor, is contrary to the will and consent of the Nashville, Chattanooga & St. Louis Railway, both as a corporation under the law of the State of Tennessee and as lessee of said Railway and a corporation of the State of Georgia under the name and style of Western & Atlantic Railroad; but this defendant alleges that neither said Nashville, Chattanooga & St. Louis Railway nor said Western & Atlantic Railroad a corporation of Georgia as aforesaid, has any right, power or authority to object to the possession, construction, maintenance and operation of said lines of telegraph, or to object to the possession, use and enjoyment of the aforesaid easements and interest in land in, through, upon and over what is known as the right of way of the Western & Atlantic Railroad; nor have they or either of them any right, power or authority whatever to interfere with the possession, use, enjoyment, construction, maintenance and operation thereof by defendant. Any interference with, and any removal of said lines of telegraph from the right of way of the Western & Atlantic Railroad, and any Georgia statute, law, judgment or decree so requiring, will deprive defendant of its lawful rights and properties vested in, and secured to, it by the laws and constitutions of Georgia and of the United States, and will be unjust and inequitable to defendant, not only under and because of the facts above alleged, but also under and because of the following facts:

The cost or value of the telegraph poles, cross arms and fixtures belonging to defendant as they now stand in place upon or along the said right of way is large and amounts to many thousands of dollars. Should said telegraph poles with their supports, cross arms, wires and fixtures be removed from the said Western & Atlantic Railroad and its right of way, there would unavoidably be great [fol. 154] breakage and damage; much would not be available for the construction of another line or lines elsewhere to take the place of those removed or destroyed, and the cost of establishing another line elsewhere, transporting poles, wires and instruments to a new line, would be exceedingly great. Besides this, the destruction of this link or part of defendant's system would affect the value of the system itself and would deprive defendant of the good will and

business which it has during the long course of its possession and operation of said lines upon or along said Western & Atlantic Railroad and its right of way built up and established.

Defendant at the times hereinabove mentioned did at great cost and expense to itself erect, construct, reconstruct, equip and maintain the said telegraph lines along and upon the said Western & Atlantic Railroad from Atlanta, Georgia, to Chattanooga, Tennessee, which said lines were intended to become, and did become, and now are, a component, important, permanent link or part of the extensive and constantly growing telegraph system of defendant, all of which was, during all of the time of the erection, construction, reconstruction, maintenance and operation and possession aforesaid of said lines of telegraph, properties and easements, well known to the State of Georgia, to the several lessees of the Western & Atlantic Railroad, and to all persons owning or having any interest in the land and property on, upon and over or through which said telegraph lines were so constructed, maintained and operated. Neither the State of Georgia nor any other lessee from the State of Georgia, nor any person, having or claiming any right, title or interest in or to the land and properties on, upon, along, through or over which said telegraph lines have been so constructed, maintained and operated, have at any time ever objected to the erection, construction, reconstruction, equipment, maintenance and operation of said telegraph lines by defendant, except the objection made by the first lessee whose claim was denied by the Supreme Court of the United [fol. 155] States as hereinabove alleged.

Defendant, prior to its acquisition of said lines of telegraph and at all times subsequent thereto, has possessed, maintained and operated a very large and extensive system of telegraph, constructed at great cost and expense to it, which it has constantly enlarged and developed, extending its lines to new and more distant points, and at the time said lease became operative (December 27th, 1919) defendant's system of telegraph had become very vast and reached all points in the world of any importance. The lines of telegraph hereinabove mentioned upon or along the Western & Atlantic Railroad were, and are, of great and increasing importance, and were and are an important link in defendant's system.

Defendant's system of telegraph operated directly by it now consists of more than one hundred and ninety two thousand (192,000) miles of poles and cables and over nine hundred thousand (900,000) miles of wires, covering practically the entire territory of the United States, reaching every city of any importance, and almost every station on the various lines of railroads, except flag or non-important stations. During the times hereinabove mentioned, the services rendered by defendant to the public and to the Government of the United States has constantly increased, and the said telegraph lines on or along said Western & Atlantic Railroad have continuously increased in importance as a link in defendant's system, and the service rendered over said lines both to the public and to the Government has constantly and continuously increased.

The said lines of telegraph on or along the Western & Atlantic



Railroad is a link in that portion of defendant's system which constitutes the most direct and shortest route between Atlanta and points south and east thereof and Chattanooga and points north and west thereof, and is one of the main channels for the transmission of messages between the great centers of trade in the United States.

[fol. 156] The volume of business passing over defendant's telegraph lines upon and along said right of way is enormous, messages are sent continuously and with practically no cessation, and the number of messages are very great. A great number of messages originate or terminate at points on or along said Western & Atlantic Railroad. A vast number of telegrams are continuously transmitted over said lines which neither originate at or are forwarded from, nor terminate or are deliverable at, points on said railroad, of which telegrams a great number annually are transmitted for the Government of the United States, its officials and departments.

Two circuits of one wire each on said lines are leased to the Associated Press, one circuit being in continuous service twenty four (24) hours of each day, and the other being in continuous service five (5) hours each day, besides which a great many messages are transmitted for the Press known as Associated Press Pony Reports.

Reports transmitted over defendant's lines on said right of way for the Government of the United States, its officials and departments, include reports from weather observatories concerning weather conditions upon which weather maps and forecasts are made, and weather reports or messages giving the result of the compilation of the reports last above named. These weather reports are of great value to the public at large and of special importance to those engaged in agricultural pursuits, navigation, &c.

The laws of the United States and of Georgia, herein above mentioned, impose upon the Western Union Telegraph Company, under pains and penalties therein provided, the duty and obligation of receiving, transmitting and delivering for the United States, for Georgia and for the public messages over its lines of telegraph including said lines of telegraph upon or along the Western & Atlantic Railroad. Said statutes make it unlawful for any person whomsoever to destroy or damage said lines of telegraph or to pre-[fol. 157] vent the maintenance and operation thereof, or to do any act which will interfere therewith, or which will defeat the ability of the Western Union Telegraph Company to perform its said duties and obligations.

VII. Answering the allegations of the 7th paragraph of the petition this defendant denies that the plaintiffs in this cause, or any of them, have any right, title or interest in or to, or own or are entitled to the possession of, the said lines of telegraph and the easements necessary therefor hereinabove described. Defendant alleges on the contrary that it has exclusive right and title thereto and possession thereof. Defendant denies that its said possession, use and occupation of said lines of telegraph and easements are without warrant in law, and denies that its possession and use thereof is a



continuing trespass and a constantly recurring grievance to the plaintiffs or any of them. This defendant admits that its said use, occupation and possession of said lines of telegraph and easements are adverse to the plaintiffs and to each of them and has been continuously adverse to the State of Georgia, to the several lessees under it of the Western & Atlantic Railroad, above mentioned, and to all persons whomsoever from the time that it acquired title thereto and possession thereof in the year 1866 as above alleged; and admits that the title thereto in, and the possession thereof by, its predecessors in title from the first construction of said lines and the enjoyment of said easements to the time of the acquisition and possession thereof by the Western Union Telegraph Company was continuously adverse to the State of Georgia and to all persons whomsoever.

VIII. Defendant admits that the General Assembly of the State of Georgia passed an act entitled "An Act to provide for the leasing or other disposition of the Western & Atlantic Railroad and its property; for the creation of a commission to effectuate such purpose [fol. 158] pose and to define its powers and duties; making an appropriation for the cost of the work required, and for other purposes," which was approved November 30th, 1915.

Said act created a commission "authorized and empowered to lease and contract for the leasing of the railroad properties known as the Western & Atlantic Railroad, including the terminals thereof, and its property other than its railroad property not connected with either of its terminals;" directed said commission to make a report to include "a full and complete inventory of all personal property, rolling stock, equipment, supplies, tools, etc. to be included in the lease as received from the present lessee;" directed the commission to consider and determine among other things

"7. What, if any, property is owned by the Western & Atlantic Railroad, not useful for railroad purposes, that could be properly and advantageously disposed of separately from the lease of the road.

"8. What, if any, steps should be taken to assert the right and title of the State to any part of the right of way or properties of the road that may be adversely used and occupied."

And required the Commission to cause to be prepared, if not otherwise obtainable, complete and accurate surveys, copies profiles and easements showing:

"2. The extent and character of every use or occupation of the right of way, tracks and other properties of the road by any person or corporation other than the lessee, and the authority therefor.

"3. The properties not used or apparently not useful for railroad purposes, with an estimate of the market value of such properties, and the use to which they might be applied."

Said commission was by said act further instructed and directed [fol. 159] to prepare bills for presentation to the General Assembly

to carry into effect any recommendation which it might make "with respect to what steps should be taken to assert the right and title of the State to any part of the right of way of any part of the road that may be adversely used or occupied; and with respect to any other recommendations which, in its opinion, and which may require legislation by the General Assembly of Georgia to fully, completely and adequately protect all the interests of the State of Georgia in regard to said road and all of its parts and properties, whether reckoned as surface overhead or underground rights."

Defendant admits that the General Assembly of Georgia amended the last mentioned act by the adoption of an Act entitled "An Act to amend an Act approved November 30th, 1915, providing for the leasing or other disposition of the Western and Atlantic Railroad and its properties, and for the creation of a commission to effectuate such purpose, and for other purposes, by adding thereto other provisions further defining the powers and duties of the said commission; and for other purposes," approved August 4th, 1916.

The amendment last mentioned contains language purporting to give the commission created by the said act of November 30th, 1915 full power and authority in its discretion to deal with and dispose of any and all encroachments upon, and use and occupation of any part of the right of way and properties of the Western & Atlantic Railroad by any person other than the lessee under said act, its tenants and licences whether such encroachments, use or occupancy be permissive or adverse, and whether with or without claim of right therefor; to determine whether such encroachments, uses and occupations or any of them shall be removed and discontinued, or whether they or any of them shall be permitted to remain, and if so to what extent and upon what terms and condition; with further authority to adjust, settle and finally dispose of any and all controversies that may exist or that may arise with respect to any adverse [fol. 160] use or occupancy of any part of said right of way and properties of the Western & Atlantic Railroad in such manner and upon such terms and conditions as said commission may deem the best interest of the State require; and provides that all contracts and agreements made or entered into by said commission in settlement or disposition of matters of *matters* touching such adverse uses and occupations shall be binding upon the State of Georgia; and further authorizing and empowering said commission to take such action as it might deem proper and expedient to cause the removal and discontinuance of any encroachment, use or occupancy of said right of way and properties which in its opinion should be removed or discontinued, and to that end the commission was authorized and empowered to institute and prosecute in the name and behalf of the State of Georgia such suits and other legal proceedings as it might deem appropriate in protection of the State's interest or the assertion of the State's title.

Defendant admits that the present lease contract contains in it a reservation of a claimed right to remove or to cause to be discontinued any and all encroachments and other adverse uses and occupancies in and upon the right of way of the Western & Atlantic Railroad, whether maintained under any claim of lawful right or

not, and that to that end the Nashville, Chattanooga & St. Louis Railway consented to the withholding of delivery of possession or right to possession of such portions of said properties, rights of way as may be so adversely used and occupied until encroachments and other adverse uses and occupancies had been discontinued; with the further provision therein that the State of Georgia may at its option in such manner as it may deem best proceed to remove such encroachments, uses and occupancies in its own name and as the owner of the properties, and that to such proceedings the Nashville, Chattanooga & St. Louis Railway would become a party. For the exact and complete terms of said lease defendant refers to the lease itself and requires proof thereof.

[fol. 161] Defendant admits that said Western and Atlantic Railroad Commission has recently on a date unknown to defendant passed a resolution with preamble and recitals therein, a copy of which is hereto attached as Exhibit 14. Defendant for lack of sufficient information is unable to admit or deny any act or resolution by said commission other than as herein admitted, nor the allegation that this suit is brought in accordance with authority and direction from said Commission. Defendant denies that said Commission has such power and authority, and denies that the Governor of Georgia and the Secretary of State of Georgia, who executed and delivered said lease, had any power and authority to insert in said lease the aforesaid provisions, or to make the claims or asserts the rights in said provisions made or to contract with respect thereto, and particularly in so far as such provision, claims, and claimed rights apply to this defendant, and its said lines of telegraph and easements.

Defendant denies that the act of November 30th, 1915 or any amendment thereof authorizes and empowers said Commissioners therein appointed.

To adopt said resolution, or to give the direction or authority therein set forth; or

To take any act, or to institute this suit, or to institute any proceeding;

To question or attack defendant's right to maintain, construct, reconstruct and operate in perpetuity its said lines of telegraph above described, or to attack defendant's right and title thereto and to the perpetual easements and rights in land necessary therefor; or

To attack or to seek to annul or have adjudged ineffective in any way or to any extent the grants and permits given by the State of Georgia to defendant and its predecessors in title by the statutes and resolutions of the State of Georgia herein above alleged; or

[fol. 162] To attack or impair any right or title in or to, or possession of, said easements and rights in, on, along, through or over the right of way of the Western & Atlantic Railroad, acquired as aforesaid by defendant or its predecessors in title; or

To remove or to interfere with defendant's said lines of telegraph and easements; or

To prevent or defeat the performance by defendant of its obligations under or to deprive defendant of the rights, properties and franchises acquired by it under, the said act of Congress and its amendments.

Defendant alleges, if the Georgia Act of November 30th, 1915, or any amendment thereto has the force and effect and delegates the authority herein above denied by this defendant, but which defendant understands to be claimed for it by complainants in this suit and by said Commissioners appointed under said act, then said statute is opposed to the Constitutions of the United States and of Georgia; and in any event the said act and resolution of the said commissioners, and this suit, and any judgment or decree of any court giving to said statute the force and effect herein by defendant denied to it, but claimed in this suit by said complainants, and any judgment or decree of any court upholding, giving effect to, or enforcing said resolution of said Commissioners, and any judgment or decree of any court, granting the prayers of the petition in this cause, will be violative of the Constitutions of Georgia and of the United States in that thereby

(a) There will be an impairment of the obligations of contracts by a statute or law passed or made subsequently which violates

Georgia Constitution Art. 1 Sec. 3 Par. 2 United States Constitution Art. 1, Sec. 10, Par. 1.

(b) The State of Georgia will have made and enforced a law revoking grants of privileges or immunities granted to defendant and [fol. 163] and its predecessors above alleged in such manner as to work injustice to defendant which violates

Georgia Constitution Art. 1, Sec. 3, Par. 3.

(c) The rights, privileges and immunities which as above alleged have vested in, or accrued to, defendant under and by virtue of the acts of the General Assembly of Georgia will not be held inviolate by all courts before whom they may be brought in question, which violates

Georgia Constitution Art. 12, Sec. 1, Par. 5.

(d) Thereby property of defendant will have been taken without due process of law which violates

Georgia Constitution Art. 1, Sec. 1, Par. 3.

" " Art. 1, Sec. 3, Par. 1.

United States Constitution 5th Amendt.

" " " 14th " Par. 1.

IX. Defendant for further plea and answer says that plaintiffs should not, nor should either of them, have or maintain this suit, nor are either of them entitled to any judgment, decree, or relief herein, but plaintiffs and each of them have long been, and now are, barred therefrom, because the State of Georgia did not bring suit for the recovery of the real estate, easements and interest in land claimed in this suit within seven years after the commencement of the adverse possession of said telegraph lines and easements by the first predecessor in title of defendant commenced as herein above set forth (and to which allegations defendant prays leave to refer with the same effect as if herein repeated) under the written evidence of title herein above alleged, particularly the aforesaid contract of the State of Georgia with Garst & Bean, the Georgia act aforesaid approved

January 27th, 1852, incorporating the Augusta, Atlanta and Nashville Magnetic Telegraph Company which adverse title continued in that corporation and its successors in title as herein above alleged, [fol. 164] and now referred to as if herein again repeated and set forth.

X. Defendant for further plea and answer says that plaintiffs should not, nor should either of them, have or maintain this suit, nor are either of them entitled to any judgment, decree or relief herein, but plaintiffs and each of them have long been, and now are, barred therefrom, because of the laches and long delay by the State of Georgia as herein above alleged, reference being here made to said allegations to which leave to refer with the same force and effect as if herein again repeated and set forth is prayed.

XI. Defendant for further plea and answer says that plaintiffs should not, nor should either of them, have or maintain this suit, nor are either of them entitled to any judgment decree or relief herein, but plaintiffs and each of them, have long been, and now are, barred therefrom, as to said telegraph lines of defendant and the said easements therefor in the State of Tennessee, and are now barred from instituting or maintaining this suit for the recovery of real estate, easements and interests in land in Tennessee in this suit claimed and sought to be recovered because of the neglect of the State of Gorgia and those claiming under it as herein above alleged for the term of seven years after the claimed right of action accrued to avail themselves of the benefit of any title legal or equitable, by action at law or in equity effectually prosecuted against defendant, the person in possession of said telegraph lines and easements, with or without recorded assurance of title prior to the year 1895, and since the year 1895 with recorded assurance of title as provided by the laws of Tennessee in paragraph VI herein alleged. To the said allegations leave of reference is here made with the same force as if herein repeated and again set forth.

[fol. 165] XII. Defendant prays leave to refer to each and every Exhibit hereto attached with all entries and certificates of record thereon with the same force and effect as if set forth in full in this answer.

W. L. Clay, Brewster, Howell and Heyman, Def'ts Attys.

[fol. 166]

#### EXHIBIT 1 TO ANSWER

October 11th, 1850.

Garst & Bean:

The Western & Atlantic proposes:

1. To furnish poles from Atlanta to Chattanooga.
2. To grant you the use of our right of way and to pass officers and material free.

3. For foregoing \$5,000.00 is to be paid Western & Atlantic Railroad, and it will receive dividends in future instead of interest. The Western & Atlantic Railroad is to be represented at meetings of the Telegraph Company by Chief Engineer.

4. All telegraph offices between Atlanta and Chattanooga shall be free of charge to the Telegraph Company.

W. L. Mitchell, Chief Engineer.

---

#### EXHIBIT 2 TO ANSWER

Memorandum of An Agreement made and entered into this 12th day of August, 1858 in the City of Lynchburg, Va., between Alvin D. Hammett of Marietta, Ga., party of the first part, and Wm. S. Morris, Robert W. Crenshaw and John S. Langhorne of the City of Lynchburg, Va., parties of the second part

Witnesseth:

That for and in consideration of the undertakings of the parties of the second part hereafter to be covenanted that the party of the first part agrees to sell transfer and assign to the parties of the second part all the line of telegraph from the City of Chattanooga in Tennessee to the City of Augusta in Georgia known as being a part of the Augusta, Atlanta and Nashville Magnetic Telegraph line with the side line to the City of Athens with all the privileges, rights and franchises, appertaining thereto with all the wire, batteries, instruments and furniture belonging thereto, and to warrant and defend the title to the same against the claim or claims of all persons whatsoever.

[fol. 167] The parties of the second part agree to pay to the party of the first part as soon as he shall transfer and assign to them (which he undertakes and agrees to do within the period of thirty days from the date of this instrument) that portion of the said line between Chattanooga in Tenn., and Atlanta in Ga., with a perfect title to the same, with all the wire, batteries, apparatus and fixtures and instruments and all the rights and franchises appertaining thereto, the sum of Fifteen Hundred dollars (\$1,500.00)

And the parties of the second part further agree to pay to the party of the first part whether he shall deliver to them at Dalton in Ga., one hundred miles of the wire which is now rolled up and distributed in the depots of the Georgia Railroad together with all the instruments, batteries, apparatus and furniture on said line between Atlanta and Augusta the sum of Fifteen hundred dollars (\$1,500.00)

And the parties of the second part further agree that whenever the party of the first part shall make to them a perfect and satisfactory title to all the Telegraph Line between Atlanta and Augusta (both in Georgia) known as a part of the Augusta, Atlanta and Nashville Magnetic Telegraph Line with a transfer of all the rights, privileges and franchises appertaining thereto, with the branch line to Athens

in Ga., with its appurtenances etc.—to deliver to the party of first part their three promissory notes for one thousand dollars (\$1,000) each, payable, one at four months the second at eight months and the third at twelve months from the date of said transfer of said line between Atlanta and Augusta with the Athens branch.

In witness whereof we have hereunto set our hands this day and date above named.

(Signed) A. D. Hammett, W. S. Morris, R. W. Crenshaw,  
F. S. Langhorne.

Attest: F. B. Beans, Jr.

[fol. 168]

EXHIBIT No. 3 TO ANSWER

STATE OF GEORGIA,

Cobb County:

This Indenture made this the first day of September in the year of our Lord Eighteen hundred and fifty eight, between A. D. Hammett of the County of Cherokee in said State of Georgia, of the one part and William S. Morris, John S. Langhorne and Robert W. Crenshaw of Lynchburg, Campbell County and State of Virginia of the other part,

Witnesseth:

That the said A. D. Hammett for and in consideration of the sum of Twenty Five Hundred dollars to him in hand paid at and before the signing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted bargained sold and conveyed, and by these presents doth grant, bargain, sell and convey unto the said William S. Morris, John S. Langhorne and Robert W. Crenshaw their heirs and assigns the telegraph line from the City of Atlanta in the county of Fulton in said State of Georgia to the line dividing the said State of Georgia from the State of Tennessee which said telegraph line is situated and located immediately along the line of the Western & Atlantic Railroad, a distance of one hundred and twenty miles more or less running through the following counties, and parts of counties in said State of Georgia, to-wit: Fulton, Cobb, Cass, Gordon, Whitfield and Catoosa which said telegraph line is known as the Augusta, Atlanta and Nashville Telegraph line—together with all the wires, posts, insulators, hooks, franchises, instruments, acids, zincs and office furniture of every description whatever belonging or in any wise appertaining to said telegraph line and the various offices belonging thereto at and between the said city of Atlanta and the said line between the said State of Georgia and Tennessee.

To Have and to Hold the said telegraph line together with all and singular the franchises and all fixtures and furniture of every description whatever belonging to or appertaining to said telegraph line between the points aforesaid, unto them the said Wil-



William S. Morris, John S. Langhorne and Robert W. Crenshaw their heirs, executors, administrators and assigns together with all the rights numbers and appurtenances thereof to the same in any manner belonging, to them and their own proper use, benefit and behoof forever in fee simple. And the said A. D. Hammett for himself his heirs, executors, and administrators the said bargained property and premises unto them the said William S. Morris, John S. Langhorne and Robert W. Crenshaw their heirs and assigns will warrant and forever defend the right and title thereof against the claim of all other persons whatever.

In Witness Whereof, the said A. D. Hammett hath hereunto set his hand and seal the day and year first above written.

(Signed) A. D. Hammett.

Signed, sealed and delivered in the presence of us: W. C. Ross, A. N. Simpson, N. P.

Recorded in Catoosa Co.

" " Cass Co.

" " Gordon Co.

" " Fulton Co.

" " Whitfield Co.

The foregoing conveyance is recorded in the Office of Clerk of the Superior Court of the following counties of Georgia and in the book and at the page following the name of each county respectively:

Catoosa County Book B, page 333.

Cass County Book O, page 194.

Gordon County Book D, page 420.

Fulton County Book D, page 137.

Whitfield County, Book D, — 74.

[fol. 170]

#### EXHIBIT 4 TO ANSWER

STATE OF TENNESSEE,

County of Hamilton:

This Indenture made this the 13th day of November in the year of our Lord 1858, between George L. Willy of the City of Nashville in said State of Tennessee of the one part, and William S. Morris, John S. Langhorne and Robert W. Crenshaw of Lynchburg, Campbell County and State of Virginia of the other part,

Witnesseth:

That the said George L. Willy for and in consideration of the sum of Five Hundred dollars to him in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold and conveyed and by these presents doth grant, bargain, sell and convey unto the said William S. Morris, John S. Langhorne and Robert W. Crenshaw

their heirs and assigns the telegraph line from the City of Chattanooga running through said County of Hamilton situated and located immediately along the line of the Western & Atlantic R. R. to the State line dividing the State of Tenn., from the State of Ga., which said Telegraph line is known as the Augusta, Atlanta and Nashville Telegraph line, together with all and singular the wires, posts, insulators, books, franchises, instruments, acids, zincs and office furniture of every description whatever belonging or in any wise appertaining to said telegraph line and the various offices belonging thereto, at and between the points aforesaid.

To have and to hold the said telegraph line together with all and singular the franchises and all fixtures and furniture of every description whatever belonging to or appertaining to said Telegraph line between the points aforesaid unto them the said Morris, Langhorne and Crenshaw their heirs executors administrators and assigns together with all the rights, members and appurtenances thereof to the same in any manner belonging, to them and their own proper use benefit and behoof forever in fee simple. And the said George [fol. 171] L. Willy for himself his heirs executors administrators the said bargained property and premises unto the said Morris, Langhorne and Crenshaw their heirs and assigns will warrant and forever defend the right and title thereof against the claim of all other persons whatever.

In Witness Whereof the said George L. Willy hath hereunto set his hand and affixed his seal the day and year first above written.

Geo. L. Willy.

Signed sealed and delivered in the presence of us: Jno. F. Burch, R. M. Hooke.

Acknowledged by George L. Willy on the 20th November, 1858, before J. P. McMillian, Deputy Clerk of the County Court of Hamilton County, Tennessee.

Registered 25th November 1858, in Book M, Vol. 1, page 440, and in Transcript Book M, Vol. 1, page 404, of the Registers' office of Hamilton County, Tenn.

[fol. 172]

#### EXHIBIT 5 TO ANSWER

This deed made the 28th day of December 1859 between William S. Morris, John S. Langhorne and Robert W. Crenshaw of the City of Lynchburg and State of Virginia, of one part, and the American Telegraph Company a body politic incorporated by the Legislature of the State of New Jersey, of the other part.

Witnesseth:

That in consideration of the issue and delivery to them of certificates of One Hundred and twenty shares of the Capital Stock of the said American Telegraph Company the parties of the first part

do grant, bargain, sell, assign, transfer and release unto the party of the second part, the line of Electric Telegraph extending from the town of Chattanooga in the State of Tenn., to the town of Atlanta in the State of Ga., together with all the wires, posts, insulators, batteries and instruments of every kind thereto belonging, and the office furniture in the offices on the said line and all the appurtenances to the said line belonging, or in any wise appertaining, and all the rights of way and privileges held with the said line or any part thereof, which said line is known as the Augusta, Atlanta and Nashville Telegraph Line and is more particularly described in two certain deeds of conveyance executed to the said parties of the first part, one of which is made by a certain A. D. Hammett, bearing date the first day of September 1858 and of record in the counties of Fulton Whitfield, Catoosa, Cass and Gordon in the State of Ga., and the other of which is made by George L. Willy, bearing date of the 13th day of November 1858 and of record in the offices of the Clerk and Register of the County of Hamilton in the State of Tennessee, to which reference is hereby made; To have and to hold the aforesaid line of telegraph, with all and singular its franchises and property aforesaid including the side line mentioned in the deeds aforesaid to the City of Athens in the State of Georgia, to the said party of the second part its successors and assigns forever.

And the said parties of the first part do further grant and convey unto the said parties of the second part, in consideration of the issue and delivery to them of the additional number of five shares of the capital stock of the said American Telegraph Company, whatever right, title or interest they now have or may hereafter acquire to construct a Telegraph line from the said town of Atlanta to the City of Augusta in the State of Georgia, under the charter of the Augusta, Atlanta and Nashville Magnetic Telegraph Company by virtue of a contract between said parties of the first part and the said A. D. Hammett bearing date the 12th day of August in the year 1858.

And the said parties of the first part for themselves their heirs, &c., do covenant jointly and severally with the said party of the second part their successors and assigns that they have good right and title to make the said assignment of the said Telegraph line from Chattanooga, to Atlanta with the appurtenances in manner aforesaid, and so that the said party of the second part may hold and enjoy the same without any lawful claim, hindrance or interruption of any Company or companies, person or persons whomsoever.

In Witness Whereof the said parties of the first part have hereunto set their hands, and seals the day and year first above written.

(Signed) W. S. Morris, J. S. Langhorne, R. W. Crenshaw.

STATE OF VIRGINIA,

City of Lynchburg:

I, William Waller a Justice of the Peace in and for said City do hereby certify that William S. Morris, Robert W. Crenshaw and

John S. Langhorne, whose names are signed to the foregoing deed bearing date on the 28th day of December 1859 personally appeared before me in said City and acknowledged the same to be their act and deed.

[fol. 174]

EXHIBIT 6 TO ANSWER

This agreement made and executed this 12th day of June A. D. 1866, by and between the American Telegraph Company, a Corporation chartered by the State of New Jersey, party of the first part, and the Western Union Telegraph Company, a corporation existing under the laws of the State of New York party of the second part,

Witnesseth:

That whereas it is deemed necessary and expedient on the part of the respective Telegraph Companies herein named, that an equitable agreement to be made for the united management of the property and business of the companies and a consideration of interests involved, in order to facilitate and expedite the service of the public in the transmission and delivery of messages and to secure on a more firm and reliable basis and advance the interests of the stockholders.

Now therefore, it is mutually agreed by and between the parties hereto as follows:

First. The party of the first part in consideration of the premises and other valuable considerations covenanted, paid, and to me paid, does hereby grant, lease and convey to the party of the second part the right to take the possession, use, management and control of all the lines of Telegraph owned, leased, operated, or controlled by the party of the first part, wherever situated, together with all the instruments, poles, insulators, wires and other materials, grants property and right to property of every description, including moneys on hand or due, to which the party of the first part is now or may be hereafter entitled and also all franchises so far as they can be lawfully transferred, and to use, operate and enjoy the same in such way and manner as the party of the second part may deem to be for the benefit of the interests involved.

And the party of the first part agrees to execute such other and further instruments or conveyance or agreement as may be necessary [fol. 175] or reasonably be required by the party of the second part to convey a good legal title to all or any of the above described property, or to give full force and effect to the true intent and meaning of this agreement.

Second. The party of the first part agrees that all business hereafter done by them and until their lines and property are turned over, as herein provided, shall be accounted for, and the net proceeds thereof enure to the party of the second part, and that no dividend in money, stock or property shall be hereafter made to any

of the stockholders of the said party of the first part, except such as may accrue after the consolidation provided for by this agreement.

And the party of the second part, in consideration of the premises hereby agrees—

First. To choose annually for five years from and after the exemption and ratification of this agreement from those now stockholders or members of the Board of Directors of the party of the first part, and who shall continue to be stockholders in the Company composing the party of the second part, and be otherwise eligible thereto, four persons to be members of the Board of Directors consists of fifteen members, and a like proportionate number to the whole if the number of said Board shall be increased.

Second. To increase its Capital Stock, which as now issued and contracted to be issued, is Twenty eight millions four hundred and fifty thousand dollars (\$28,450,000.00) by the further issue of shares of the par value of one hundred dollars each, and to exchange such stock for all or any portion of the present capital stock of the party of the first part, at the option of the holders thereof, if presented for exchange at the executive office of the party of the second part with the proper assignment and transfer to said last named party at any time within six months from and after the twentieth day of the present month upon the following terms, viz: Three shares of stock of the party of the second part for each one share of stock of the [fol. 176] party of the first part, the par value of each being one hundred dollars, and the number of shares of stock of said party of the first part issued or to be issued, entitled to be exchanged under this agreement shall not exceed forty thousand (40,000) equal to four millions of dollars of Capital stock of said first party requiring an issue of not exceeding one hundred and twenty thousand shares equal to twelve millions of dollars of Capital stock of said second party to be exchanged for and take up all of the stock of said first party under the terms of this agreement.

Provided, however, that in case all of the stock of the party of the first part shall not have been exchanged within the time hereinbefore specified, then the holder or holders of such unexchanged stock, shall be entitled to receive semi-annually, on the first days of January and July of each year from the said party of the second part an interest or rental income on his said stock, at the rate of eight per cent per annum upon the amount represented by the par value of each unexchanged American Telegraph Stock the period for which such rent or interest shall be computed to commence on the first day of July A. D. 1866.

Third. To assume and be responsible for all the debts, liabilities and legal obligations whatsoever, of the said party of the first part, it being the purpose and intention of this agreement to substitute the party of the second part for the party of the first part in the control and management of all the property rights and interests of said party of the first part, and in, and as to any and all legal obligations now existing, or which may hereafter arise from any contract

now existing to which the party of the first part is a party; and this stipulation is to be deemed as made for the benefit of any and all parties to legal contracts with the party of the first part who may elect to accept performance by the party of the second part as a substituted party to such contracts, and the party of the second part hereby covenants and agrees to hold the party of the first part harmless [fol. 177] from any and every legal claim and demand of every nature either on account of its business operations, or embraced in, or growing out of its several contracts absorbing the Magnetic, the South Western, the Washington and New Orleans and other Telegraph Companies. It is further mutually agreed and understood by and between the parties hereto, that the party of the second part may prior to exchanging any of its stock for that of the party of the first part, declare and pay out of the earnings and profits accruing prior to the first day of July A. D. 1866, a dividend of not exceeding two per centum upon the par value of its stock then issued or liable to be issued in exchange for stock of the United States Telegraph Company then outstanding. But the said party of the second part shall not make any other or further dividends or money or stock, or parcel out to its stockholders or others any portion of its assets in which the stockholders of the party of the first part shall not be entitled to participate. And also to continue to maintain an organization of the American Telegraph Company so long as deemed essential in order to secure to the interests hereby consolidated all rights, benefits and privileges which can only be enjoyed under such organization.

This agreement to take effect and be in operation when ratified and approved by the respective Boards of Directors of the Companies parties hereto.

In Witness Whereof, the parties hereto have caused the seals of their respective companies to be attached, duly attested, and the signatures of their respective Presidents to be subscribed.

American Telegraph Co., by Edwards S. Sanford, President;

Attest: C. Livingston, Secy., A. T. Co. (Seal.) The

Western Union Telegraph Co., by J. H. Wade, President;

Attest: O. H. Palmer, Sec., W. U. T. Co. (Seal.)

[fol. 178]

#### EXHIBIT 7 TO ANSWER

Articles of Agreement made and entered into by and between The Western Union Telegraph Company, a corporation under the laws of the State of New York, as party of the first part, and The Western and Atlantic Railroad Company, a corporation under the laws of the State of Georgia, as party of the second part, Witnesseth:

That in order to provide necessary telegraph facilities for the party of the second part, and of a better understanding of the terms of which the party of the first part shall occupy the line of Railroad

of the party of the second part with the line or lines of telegraph wires belonging to the party of the first part, and to permanently settle and define the business relations between the respective parties hereto, it is mutually contracted and agreed in consideration of the respective obligations herein assumed as follows, to-wit:

The party of the first agrees:

First: To set apart on its line of poles along said Railroad a telegraph wire for the exclusive use of said party of the second part.

Second. To equip said line of wire with as many instruments, batteries and other necessary fixtures as said party of the second part may require for use in its Railroad Stations and to put the same in complete working order.

Third. To run said wire into all the offices of said party of the first part along the line of said Railroad.

Fourth. To have said wire set apart for the exclusive use of said Railroad Company in the transmission of messages on the business of said railroad on and along the line thereof, and all such messages originating at any point on said road, whether sent from, or received at the stations of said party of the second part, or the stations of said party of the first part on said road, shall be transmitted and delivered free of charge.

Fifth. When the wire set apart to said Railroad Company shall not be in working order, to transmit free of charge over other wires [fol. 179] of said telegraph company, the messages of the Officers and agents of the party of the second part on the business of said Railroad Company between points on said road where said Telegraph Company may have stations giving precedence to messages relating to the movements of trains, over any commercial or paid messages so far as the Statutes of the State, or the United States, may allow such precedence.

Sixth. To furnish such principal Officers and Agents of the party of the second part, as may be designated by application in writing of the General Superintendent of said Railroad Company, with annual franks or passes, entitling them to send messages free, over all the lines of the party of the first part. Provided, however, that said party of the first part shall be entitled to charge up, and keep account of, all such messages transmitted to or from any point off the line of said road of the party of the second part, at its usual rates for the transmission of commercial messages and for all of such account above the amount of Two Hundred dollars (\$200) in any one month, said party of the second part shall pay one half thereof, being half rates for all the business done over the lines of the said party of the first part, above the said sum of Two Hundred dollars (\$200) per month, or in any one month.

And the party of the second part in consideration of, and agreeing to, all the foregoing, further covenants:



First. That the party of the first part shall have perpetual right of way, to erect and maintain Telegraph lines along said Railroad, of as many wires as it may deem necessary to its business, and additional lines of poles, whenever the said party of the first part shall so elect, and the exclusive right of way so far as the said party of the second part has the power to grant or secure the same, and said party of the second part if it has the right and power to refuse, will not transport poles, wires or other material for any other Telegraph Company at less than full rates for freight thereon, nor distribute or unload the same at other than the regular Railroad Stations [fol. 180] on said road; and should a competing line of telegraph be established along said Railroad, then the party of the first part shall be released from its stipulation to transmit, free of charge, any business of said Railroad Company off or beyond its line of road.

Second. To transport for said party of the first part, free of charge, all poles, wire and other material required by said party of the first part for the construction, repairs or maintenance and operation of its lines, and distribute at the places required, such poles, wire and other heavy material as may be needed, along the line of said Railroad, either in the construction of additional lines, or in the repair of the same and of existing lines.

Third. To transport in any of its passenger trains, the officers and agents of the party of the first part, and put them off at any station of said road, or at any discovered break of the telegraph wires, such officers or agents presenting franks or passes, which shall be supplied at any Ticket Office of said party of the second part, on the application of the Superintendent of the party of the first part.

Fourth. To maintain all such telegraph stations as may be opened by, or for the use and benefit of said Railroad Company, at the exclusive cost of the party of the second part; to appoint its own operators thereat; but to retain no operator who refuses, or persistently neglects, to obey the rules and regulations of said party of the first part.

Fifth. To receive for transmission, and send over the wires and deliver to address at the Railroad Telegraph Offices in towns or at Stations where the party of the first part may have no offices all commercial or other messages paid or to be collected, that may be offered, under the rules of said party of the first part, and make monthly reports thereof, and pay over monthly to said party of the first part, all the tolls collected thereon, and to cause the operators and agents of said party of the second part to observe all the rules and regulations of the party of the first part, with respect to the monthly reports of [fol. 181] business and payment of all receipts thereon; and the regular rates of tolls shall accrue to the party of the first part on any and all business received at, or transmitted from, the Telegraph Stations of the party of the second part, except the legitimate Railroad Messages of the said party of the second part.

Sixth. To pay to said party of the first part the cost of constructing the wire herein designated and set apart to the exclusive use of said party of the second part, and the cost of equipping the same at the Railroad Stations not already supplied with instruments, batteries and other necessary fixtures, as soon as the cost thereof can be ascertained.

In Witness Whereof, the parties hereto have by their proper Officers and under their corporate seals duly executed this Agreement this eighteenth day of August 1870.

The Western Union Telegraph Company, by Willm. Orton, President. Attest: George Walker, Secty. pro Tem. (Seal.) The Western Atlantic Railroad, by Foster Blodgett.

Approved. Rufus B. Bullock, Governor.

By the Governor. H. C. Corson, Secty. Ex. Dept. (Seal.)

[fol. 182]

EXHIBIT 8 TO ANSWER

\$4,000.00.

Atlanta, Ga., Sept. 11th, 1876.

Received of the Western and Atlantic Railroad Company Four Thousand Dollars in full and complete settlement of the litigation between The Western Union Telegraph Company and the Western and Atlantic Railroad Company in the United States Circuit Court for the Northern District of Georgia, recently tried in the Supreme Court of the United States. Said sum is in full of all damages and claims of damages against said Western and Atlantic Railroad Company for and on account of said suit and in full of all money received by said Company for telegraphing to this date, to which said Western Union Telegraph Company might have had any claim or demand, and in full of all legal costs and charges and attorneys or solicitors' fees. And in full of all demands or claims of any kind or nature whether in litigation or not that said Western Union Telegraph Company may now have or may have had in the past against said Western and Atlantic Railroad Company on account of a contract made by the Western and Atlantic Railroad by its Superintendent Foster Blodgett, and approved by Rufus B. Bullock as Governor of Georgia of the one part, and the Western Union Telegraph Company of the other part, on the 18th day of August 1870—which said contract is to be observed hereafter during the continuance of the balance of the period of the lease of the Western and Atlantic Railroad to said Western and Atlantic Railroad Company, by said Company and by the Western Union Telegraph Company.

The Western Union Telegraph Co., by Willm. Orton, President.

Resolved that upon the Western Union Telegraph Company signing the receipt prepared by our attorney: that the Treasurer of this Company pay over to said Telegraph Company the sum of Four thousand dollars in full and complete settlement of all liability of this Company to said "Western Union Telegraph Company" as stated in said receipt for and on account of a contract made on the 18th day of August 1870 by the "Western and Atlantic Railroad" through its Superintendent (Foster Blodgett) and approved by Rufus B. Bullock as Governor of Georgia of the one part and the "Western Union Telegraph Company of the other part: which said Contract we hereby agree to comply with and carry out, during the balance of our term of lease of the "Western and Atlantic Railroad:" Said Telegraph Company being also bound to comply with the stipulations relating thereto in said contract.

I certify that the foregoing is a true copy of a resolution adopted by the Executive Committee of "The Western & Atlantic Railroad Company" at a meeting held September 11th, 1876.

W. C. Morrill, Secretary. (Seal.)

An Act by the General Assembly of Tennessee (Acts of 1837, Chapter 221, pp. 319, 320)

"Section 1. Be it enacted by the General Assembly of the State of Tennessee, That the State of Georgia shall be allowed the privilege of making every necessary recognizance and survey for the purpose of ascertaining the most eligible route for the extension of her Western and Atlantic Railroad from the Georgia line to some point on the Eastern margin of the Tennessee River.

"Section 2. And be it enacted further, That as soon as said route and point shall be ascertained, the State of Georgia shall be allowed the right of way for the extension and construction of her said railroad from the Georgia line to the Tennessee River, and that she shall be entitled to all privileges, rights and immunities (except the subscription on the part of Tennessee) and be subject to the same restrictions as far as they are applicable, as are granted, made and prescribed for the benefit, government and direction of the Hiwassee Railroad Company.

"Section 3. And be it further enacted, That the foregoing rights and privileges are conferred upon the State of Georgia on condition that whenever application is made, she will grant and concede similar one and to as great an extent, to the State of Tennessee, or her incorporated companies."

[fol. 185]

## EXHIBIT 11 TO ANSWER

An Act of the Legislature of Tennessee (Chapter 195 of the Acts of 1847)

"An Act conferring upon the State of Georgia additional rights in relation to the Western and Atlantic Railroad:

"Be it enacted by the General Assembly of the State of Tennessee, That all the rights, privileges and immunities with the same restrictions which are given and granted to the Nashville and Chattanooga Railroad Company by the Act of the General Assembly of this State, incorporating said company, passed December 11th, 1845, are, so far as they are applicable, hereby given to and conferred upon the state of Georgia, to be enjoyed and exercised by that State in the construction of that part of the Western & Atlantic Railroad, lying in Hamilton County, Tennessee, and in the management of its business."

[fol. 186]

## EXHIBIT 12 TO ANSWER

Copies Sections 2763, 2764, and 2765 of Code of Tennessee (Sections 4456, 4457, 4458, Shannon's Code)

2763. Seven years vests estate, when.—Any person having had, by himself of those through whom he claims, seven years' adverse possession of any lands, tenements, or hereditaments, granted by this state or the State of North Carolina, holding by conveyance, devise, grant, or other assurance of title purporting to convey an estate in fee, without any claim by action at law or in equity commenced within that time and effectually prosecuted against him, is vested with a good and indefeasible title in fee to the land described in his assurance of title. But no title shall be vested by virtue of such adverse possession, unless such conveyance, devise, grant or other assurance of title shall have been recorded in the register's office for the county or counties in which the land lies during the full term of said seven years' adverse possession.

2764. Seven years' neglect bars action. And, on the other hand, any person, and those claiming under him, neglecting for the said term of seven years to avail themselves of the benefit of any title, legal or equitable, by action at law or in equity, effectually prosecuted against the person in possession, under recorded assurance of title, as in the foregoing section, are forever barred.

2765. No person or any one claiming under him shall have any action either at law or in equity for any lands tenements or hereditaments but within seven years after the right of action has accrued.

[fol. 187]

## EXHIBIT 13 TO ANSWER

Meeting of the Board of Directors at the Executive Office, 145  
Broadway, New York

June 5th, 1867.

Resolved, That this Company does hereby accept the provisions of the Act of Congress entitled "an Act to aid in the construction of Telegraph Lines, and to secure to the Government the use of the same for postal, military and other purposes" approved July 24, 1866, with all the powers, privileges, restrictions and obligations conferred and required thereby; and that the Secretary be and is hereby authorized and directed to file this resolution with the Postmaster General of the United States duly attested by the signature of the Acting President of the Company, and the Seal of the corporation in compliance with the fourth section of said Act of Congress.

Adopted unanimously.

Hiram Sibley, Acting President of the Western Union Telegraph Co. O. H. Palmer, Secy. W. U. Tel. Co. (Seal Western Union Telegraph Co.)

---

[fol. 188] EXHIBIT 14 TO ANSWER—Omitted; printed side page 58  
ante

[File endorsement omitted.]

---

[fol. 189] FULTON SUPERIOR COURT, MARCH TERM, 1920

[Title omitted]

MOTION TO STRIKE ANSWER—Filed May 1, 1920

Now come the Plaintiffs in the above stated case and, within the time provided by law, make these their exceptions to the answer of defendant therein and motion to strike said answer and certain portions thereof, as follows:

1. Plaintiffs move to strike the whole of said answer because:

(1) It presents no valid or sufficient answer to the petition of plaintiffs and does not show by any statement of fact, therein contained a good defense to the said petition.

(2) It offends against the laws of this State as to pleading, in that it fails to distinctly and specifically admit or deny the allegations of the petition, or to allege that for lack of sufficient information it is unable to do so.

(3) It sets forth, under the guise of admissions of allegations of the plaintiffs, what are not admissions of things alleged by the plaintiffs, but are assertions of rights of defendant, as though the same had been alleged by the plaintiffs; and particularly is this true as to the first sentence of paragraph 1 of said answer; the first sentence of paragraph 4 of said answer; the so-called admission of page 9 of said answer, that the Western and Atlantic Railroad was operated by the State; "not in a sovereign capacity"; the so-called admission in paragraph 7 of said answer, that defendant's possession, occupation and use of the right of way of the Western and Atlantic Railroad are adverse to plaintiffs and has been continuously adverse to the State of Georgia and its several lessees; and the so-called admission in the same paragraph of said answer that the title and possession of defendant's predecessors in title was continuously adverse to the State of Georgia and all other persons; and the plaintiffs move that the Court do strike said hereinabove specially mentioned so-called admission.

2. Plaintiffs move to strike the 3rd sentence of 1st paragraph of said answer, beginning with the words: "The said Act" and ending with the words: "persons holding such stock", because the same is immaterial and, further, because the Act of December 23rd, 1837, therein referred to authorized only sale of stock as to branch roads and such so-called stock was to be not stock in a corporation but "Scrip or certificates of debt" of the State.

3. Plaintiffs move to strike that portion of paragraph 1 of said answer, on page 2 thereof, beginning with the words, "the said Statute under which", and ending with the words: "right of way of the Western and Atlantic Railroad" upon the ground that the same is immaterial.

4. Plaintiffs move to strike that portion of paragraph 1 of said answer, on page 2 thereof, beginning with the words: "but expressly denies", and ending with the words: "sole owner in fee simple thereof", upon the ground that the same is a mere general statement of a conclusion of the pleader unsupported, either in said paragraph, or elsewhere in said answer, with specific statement of fact sufficient to authorize and support such conclusion.

[fol. 191] 5. Plaintiffs move to strike that portion of paragraph 1 of said answer, on pages 3 and 4 thereof, beginning with the words; "defendant denies that the said Western and Atlantic Railroad" and ending with the words: "Hutchinson vs. Western & Atlantic Railroad Co. 6 Heisk. 634," upon the ground that it is shown by the public laws of this State that the ownership by the State of Georgia of the Western & Atlantic Railroad is in its sovereign capacity and that as to such ownership it did not and has not waived its sovereign character and is not subject to the laws and regulations applicable to and binding upon private persons, private corporations and ordinary railroad corporations, and that, as to such ownership, it did not assume all the obligations and liabilities incident to such ownership by private persons or by corporations. Further upon the

ground that no such grants, permits or contracts by the State of Georgia to or with defendant or its predecessors in title is stated in said paragraph, or elsewhere in said answer, as are sufficient to show acquisition of title by defendant or its predecessor to the right of way of the Western & Atlantic Railroad or an easement therein, now existing. Further because no such adverse use and possession of such right of way or an easement therein, and no such non-action by the state of Georgia, is shown in said paragraph, or elsewhere in said answer, as would give to defendant, or would ripen in favor of defendant into title to said right of way or an easement therein. Further because neither non-action by the State of Georgia, nor the alleged adverse use and possession by defendant and its predecessors in title, would suffice to give to defendant title to said right of way or to an easement therein. Plaintiffs assert that, under the [fol. 192] laws of Georgia, as to its ownership of said Western & Atlantic Railroad and right of way, and the title of the State of Georgia thereto no prescription runs against said State, and that no laches or non-action on the part of its officers, will deprive it of its right to the public domain, included in which is said Western & Atlantic Railroad and the right of way thereof.

6. Plaintiffs move to strike all of the 4th paragraph of said answer, from the beginning thereof down to and including the words: "and defend all brought against the road," on page 9 of said answer, on the ground that said portion of the answer is immaterial. Further, that neither the Acts of the General Assembly nor the sections of the Code of Georgia, therein referred to, or set out, authorize or authorized the Chief Engineer of the Western & Atlantic Railroad or the Superintendent thereof, or the Governor of the State, or any of them acting together, to give away or sell the right of way of the Western & Atlantic Railroad between Atlanta, Georgia, and Chattanooga, Tennessee, or exchange the same or part of the same or an easement therein, for money, stock or other property.

7. Plaintiffs move to strike that portion of the 4th paragraph of said answer, on page 9 thereof, beginning with the words: "not in a sovereign capacity" and ending with the words: "owning and operating a railroad," upon the same grounds as those set forth in paragraph number 5 of this motion.

8. Plaintiffs move to strike that portion of paragraph 4 of said answer, beginning with the words: "this defendant denies" on page 10 of said answer, and down to the words: "this defendant has not" on page 10 of said answer, because the same states merely a conclusion of [fol. 193] the pleader, not supported, either in said paragraph or elsewhere in said answer, by sufficient specific statements of fact, to show exclusive and adverse possession and ownership by defendant.

9. Plaintiffs move to strike that portion of paragraph 4 of said answer, on page 10 thereof, beginning with the words: "This defendant denies," and ending with the words: "Western Union Telegraph Co.," upon the same ground as that set forth in paragraph numbered 8 of this motion.



10. Plaintiffs move to strike that portion of paragraph 5 of said answer, beginning with the words: "This defendant denies" on page 11 of said answer and ending with the words: "Western Union Telegraph Company," on page 11 of said answer, upon the same ground as that set forth in paragraph numbered 8 of this motion.

11. Plaintiffs move to strike that portion of paragraph 6 of said answer beginning with the words: "and it has continuously" on page 11 of said answer, and ending with the words: "by defendant and its predecessors in title," on page 12 of said answer, because the allegations therein made are merely statements of a conclusion of the pleader, unsupported either in said paragraph or elsewhere in the petition, by sufficient specific statements of fact to show ownership, possession, maintenance and operation by defendant and its predecessors in title, as therein asserted.

12. Plaintiffs move to strike that portion of paragraph 6 of said answer beginning with the words: "The said easements" on page 16 of said answer, and ending with the words: "said lines of telegraph and easements" on page 18 of said answer, upon the ground that the same is a statement of a mere conclusion of the pleader, not supported, either in said paragraph or elsewhere in the petition, with sufficient specific statements of fact to show the possession, maintenance, use and operation, by defendant and its predecessors, or the irrevocable, perpetual and assignable easements or rights therein claimed.

13. Plaintiff- move to strike that portion of paragraph 6 of said answer, beginning with the words: "Defendant denies that the use," on page 17 of said answer, and ending with the words: "in perpetuity of said lines of telegraph," on the same page, upon the ground that the same is a statement of a mere conclusion of the pleader, unsupported, either in said paragraph or elsewhere in the petition, with sufficient specific statements of fact to show that the use and occupation and possession and enjoyment therein alleged was under power and authority conferred by or grant from the State of Georgia.

14. Plaintiffs move to strike sub-paragraph (1) of paragraph 6 of said answer, upon the ground that the allegations thereof as to the effect of the Act of the General Assembly of Georgia of December 29th, 1847, are, as matter of law, unfounded and unwarranted.

15. Plaintiffs move to strike sub-paragraph (2) of paragraph 6 of said answer upon the ground that the allegations therein made are immaterial, except the last sentence thereof, which said last sentence is the statement of a conclusion unwarranted by the Acts of the Georgia Assembly, mentioned in said sub-paragraph.

16. Plaintiffs move to strike the following words of sub-paragraph (3) of paragraph 6 of said answer: "offering to grant to said Garst & Bean for purposes mentioned an easement on the right of way of the Western & Atlantic Railway without limit and perpetual in its [fol. 195] nature," for the following reasons:

(a) The copy of the offer, which is attached to the answer, does not show the offer to grant an easement without limit and perpetual in its nature.

(b) The offer is too indefinite and uncertain to warrant the same being held to be an offer of an easement on the right of way.

(c) The offer does not show the character of the easement offered.

(d) The offer does not show the extent of the easement offered.

(e) The offer does not show the offer of an easement.

17. Plaintiffs move to strike the following words of said sub-paragraph (3): "Said proposition and offer was accepted by Garst & Bean on October 11th, 1850," upon the same grounds as those last herein above stated. Further, because in what way the acceptance was made is not stated and no copy of the acceptance is set out or attached.

18. Plaintiffs move to strike the following words of said sub-paragraph (3): "thereupon the said Chief Engineer of the Western & Atlantic Railroad issued instructions for the carrying out of the contract so made" because:

(a) What was the "contract so made" does not appear.

(b) It does not appear that any contract was made which is material to the instant cause.

(c) What were the instructions issued is not stated.

19. Plaintiffs move to strike the following words of said sub-paragraph (3): "Expressly ratified and affirmed the said contract entered into between the said William L. Mitchell, Chief Engineer of the Western & Atlantic Railroad and G. W. Garst and J. M. Bean [fol. 196] on the part of said Augusta, Atlanta & Nashville Magnetic Telegraph Company,"—upon the grounds:

(a) It does not appear what "said contract" was.

(b) The relevancy or materiality of the ratification and affirmance of "said contract" to any issue in the instant cause does not appear.

20. Plaintiffs move to strike from said sub-paragraph (3) of paragraph 6, the words: "under and by virtue of said contract and statute," because what was the contract is not sufficiently alleged.

And to strike the following words from the same sub-paragraph: "And the Augusta, Atlanta & Nashville Magnetic Telegraph Company was thereby granted and acquired perpetual irrevocable and assignable easements for the construction, maintenance and operation thereof," upon the following grounds:

(a) The same are merely the statements of a conclusion of the pleader not sustained by any sufficient specific allegation of fact.

(b) "Said contract and Statute" and the building and operation of the first line of telegraph upon and along the Western & Atlantic Railroad by said Telegraph Company, under and by virtue of the same, does not constitute the granting and acquisition of the easements as alleged in said sub-paragraph (3).

21. Plaintiffs move to strike sub-paragraph (4) of said paragraph 6 of the answer because:

(1) It is not stated what were the telegraph lines, properties and easements which were sold, conveyed and delivered to Hammett and Willy, or when "during and about the year 1858" the same was made.

[fol. 197] (2) It is not stated whether the said sale, conveyance and delivery was by the corporation or was under levy and judicial sale.

(3) Levy of what kind of execution or writ or process, issuing from what Court, or sale thereunder where, is not stated.

(4) The allegations of said paragraph are too indefinite and uncertain to furnish a sufficient statement of how title and what title passed to Hammett and Willy.

22. Plaintiffs move to strike the first sentence of sub-paragraph (5) of said paragraph 6, because the exhibit 2 attached to the answer does not show a deed of conveyance.

23. Plaintiffs move to strike sub-paragraph (6) of said paragraph 6 because:

(a) It does not appear from the allegations of fact made what title Hammett had to convey to Morris et al.

(b) It is alleged that the title was in Hammett and Willy to all the telegraph lines, properties and easements of the Atlanta, Augusta & Nashville Magnetic Telegraph Company, so that so far as shown by the allegations made Hammett and Willy owned in common the telegraph lines, property and easements from Atlanta to the dividing line between Georgia and Tennessee, and no conveyance of the interest therein owned by said Willy is shown or alleged.

24. Plaintiffs move to strike sub-paragraph (7) of said paragraph 6 because:

(a) It does not appear from the allegations of fact made what title Willy had to convey to Morris et al.

(b) It is alleged that the title was in Hammett and Willy to all the telegraph lines, properties and easements of said Telegraph Company, so that so far as shown by the allegations made Hammett and Willy owned in common the telegraph lines, property and easements from Chattanooga to the dividing line of Georgia and Tennessee [fol. 198] see and no conveyance of the interest therein owned by Hammett is shown or alleged.

25. Plaintiffs move to strike sub-paragraph (8) of said paragraph 6 because it does not appear from the allegations made what title William S. Morris et al. had to the property alleged to have been conveyed by them to the American Telegraph Company.

Further because it appears that said Morris et al. did not have the title to said property.

26. Plaintiffs move to strike sub-paragraph (9) of said paragraph 6 because:

(a) It does not appear from the allegations made what title the American Telegraph Company had to the lines of telegraph, properties and easements and rights upon or along the right of way of the Western & Atlantic Railroad.

(b) Copy of the alleged conveyance, attached as exhibit 6 to the answer, shows it to be in the nature of an agreement of lease and to take effect when ratified and approved by the Boards of Directors of the parties thereto, and no such ratification and approval is alleged.

27. Plaintiffs move to strike sub-paragraph- (4), (5), (6), (7), (8) and (9) of said paragraph 6 because no allegation of fact made therein or elsewhere in said answer show that franchises or rights or easements given or granted by the State of Georgia to the Augusta, Atlanta & Nashville Magnetic Telegraph Company were assignable, so as to bind said State by such assignment, or so that assignments thereof would convey as against said State any easement in or upon the right of way of the Western & Atlantic Railroad.

28. Plaintiffs move to strike the first two sentences of sub-paragraph (10) of said paragraph 6 upon the ground that there was no authority of law to the Superintendent of the Western & Atlanta [fol. 199] Railroad to make on behalf of the State the grant and conveyance therein alleged, either with or without the consent of the Governor of Georgia.

29. Plaintiffs move to strike those portions of said sub-paragraph (10) beginning with the words: "After the lease," on page 23 of said answer and ending with the words: "Until the institution of this suit" on page 26 of said answer, on the ground that the allegations thereof are immaterial, and are as to things occurring between defendant and a party other than plaintiffs and which do not affect the rights of the State of Georgia.

30. Plaintiffs move to strike that portion of said sub-paragraph (10) following the portion last above mentioned and seeking to set up the defenses of laches and the statutes of limitation, upon the ground that said defenses are not available to defendant as against the State of Georgia.

31. Plaintiffs move to strike all of sub-paragraph (11) of said paragraph 6 from the beginning thereof through the words: "of the present Code of Georgia," upon the ground that the provisions of the Act of March 6th, 1856, therein alleged constitute no defense to plaintiffs' suit and that the same do not, under the law of Georgia, affect the right of the State of Georgia to recover in this suit, and do not authorize the assertion, as against said State, of claim of title by prescription to any part of the right of way of the Western & Atlantic Railroad, or to an easement therein or thereon. Further to the assertion made in said sub-paragraph that "the foregoing provisions" of said Act of 1856 are embodied in paragraphs 4369 and 4371 of the present Code of Georgia, upon the ground that an examination of said Sections of the Code shows that said assertion is not correct.

32. Plaintiffs move to strike the allegations of said sub-paragraph (11) as to the resolutions approved December 19th, 1893 and December 18th, 1894, upon the ground that the same are unfounded in fact and law, and that said resolutions do not make the provisions and recognition alleged in said sub-paragraph (11).

33. Plaintiffs move to strike those portions of sub-paragraph (11) of said paragraph 6 beginning with the words: "The State of Georgia was authorized" on page 28 of said answer and ending with the words: "Exhibit 12" on page 29 of said answer, upon the ground that under the law the ownership by the State of Georgia of the Western & Atlantic Railroad from Atlanta, Georgia to Chattanooga, Tennessee is an ownership in its sovereign capacity, and not subject to all the burdens and liabilities imposed by law or equity upon private persons or ordinary railroad companies; and that the legislative enactments referred to or set forth in said sub-paragraph (11) do not otherwise provide.

34. Plaintiffs move to strike all the remainder of sub-paragraph (11) of said paragraph 6 upon the ground that the same are mere general allegations of claims of title by prescription to perpetual easements in defendant and its predecessors, in or upon the right of way of the Western & Atlantic Railroad, as against the State of Georgia, and such prescription does not run against said State.

35. Plaintiffs move to strike these portions of sub-paragraph (12) of said paragraph 6 extending from the beginning of said sub-paragraph down to and through the words: "Under and by said accepted Act of Congress"—upon the grounds

(a) The same are immaterial.

(b) There is no warrant of law for the claims made in said portions of said sub-paragraph (12) as to matters of law, and no sufficiently specific allegations of fact made therein to sustain the claims [fol. 201] and conclusions of fact therein set out.

36. Plaintiffs move to strike that portion of sub-paragraph (12) of said paragraph 6 beginning with the words: "but this defendant alleges" on page 36 of said answer and extending through the words: "maintenance and operation thereof by defendant," on the same page, upon the ground that the same is a mere general statement of a conclusion of the pleader, unsustained by any sufficient specific statement of fact as to the right of plaintiffs or either of them to object to the possession or use by defendant of the claimed easement in or upon the right of way of the Western & Atlantic Railroad.

37. Plaintiffs move to strike those portions of sub-paragraph (12) of said paragraph 6 beginning with the words: "The cost or value" on page 36 of said answer, and extending to the end of said paragraph 6, upon the ground that they are immaterial.

38. Plaintiffs move to strike that portion of paragraph 7 of said answer beginning with the words: "This defendant admits" and extending to the end of said paragraph, upon the grounds:

(a) The same is not an admission of anything charged in the petition.

(b) The same is a mere general statement of a conclusion of the pleader, unsupported by any sufficient specific statements of fact to show right of prescription against the State of Georgia, or to show adverse possession.

39. Plaintiffs move to strike those portions of paragraph 8 of said answer, beginning with the words: "Defendant denies that said Commission has such power and authority" and extending through the words: "defendant's said lines of telegraph and easements," upon [fol. 202] the grounds that under the Act of November 30th, 1915, and the amendment thereto of August 4th, 1916, and the resolution of the Western & Atlantic Railroad Commission, copy of which is attached to the answer as exhibit 14, the power and authority of said Commission, and the Governor and Secretary of State of the State of Georgia, respectively, which are denied by said portions of paragraph 8 of the answer, do in law exist and were conferred by said Acts of the General Assembly of Georgia and the lease contract made thereunder.

40. Plaintiffs move to strike that portion of said paragraph 8 beginning with the words: "To prevent or defeat" and ending with the words: "its amendments" upon the ground that the exercise of said power and authority would not have the effect upon the obligations, rights, properties and franchises of defendant, ascribed to such exercise by said portion of the answer which plaintiffs move to strike.

41. Plaintiffs move to strike those portions of paragraph 8 of said answer beginning with the words: "Defendant alleges, if the Georgia Act" and extending to the end of said paragraph, upon the ground that said Act of November 30th, 1915, as amended is not opposed to any of the provisions of the Constitution of Georgia or of the United States, nor would the judgment or decree of this Court granting the prayers of the petition be opposed to such provisions.

42. Plaintiffs move to strike paragraphs 9, 10 and 11 of the said answer, upon the ground that the same are mere general statements of conclusions of the pleader, unsupported by any sufficient, specific statements of fact to show that plaintiffs are barred from maintaining their suit, on laches of the State of Georgia, or that plaintiffs are barred from maintaining this suit as to the easements claimed by defendant to exist in the State of Tennessee.

Wherefore plaintiffs pray that their motion be sustained, that the answer be stricken, and that each of the portions thereof which plaintiffs have herein moved to strike be stricken.

W. A. Wimbish, Tye, Peeples & Tye, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 204]

IN FULTON SUPERIOR COURT  
ORDER ON MOTION TO STRIKE

The within motion of plaintiffs to strike the answer and portions of the answer of the defendant, coming on to be heard after argument had, It is ordered that the paragraphs of said motion numbered 1, 19, 20, 23, 24, 25 and 27 be and they are hereby overruled, and that all the remaining paragraphs of said motion be and they are hereby sustained. It is further ordered that the defendant be and it is allowed until Jan'y. 15, 1921, within which to amend its answer so as to meet and conform to the rulings herein above made, and in the absence of sufficient amendment thereof within said time, those portions of the answer as to which said motion is sustained as above stated, and which are not so sufficiently amended shall be stricken.

This Dec. 4, 1920.

J. T. Pendleton, Judge Superior Court Atlanta Circuit.

[fol. 205] FULTON SUPERIOR COURT, NOVEMBER TERM, 1920

[Title omitted]

EXCEPTIONS TO ORDER ON MOTION TO STRIKE—Filed Dec. 30, 1920.

The within motion of plaintiffs to strike the answer and portions of the answer of the defendant coming on to be heard after argument thereof, It is ordered that the paragraphs of said motion numbered 1, 19, 20, 23, 24, 25 and 27 be and they are hereby overruled; and that all the remaining paragraphs of said motion be and they are hereby sustained. It is further ordered that defendant be and it is allowed until January 15th, 1920, within which to amend its answer so as to meet and conform to the rulings herein above made, and in the absence of sufficient amendment thereof, within said time, those portions of the answer as to which said motion is sustained, as above stated, and which are not so sufficiently amended, shall be stricken.

Dec. 4th.

J. T. Pendleton, Judge S. C. A. C.

[fol. 206] To so much of said judgment as sustains the said motion of the said plaintiffs and as sustains the several grounds or paragraphs of said motion therein stated to be sustained by the court, said defendant, the Western Union Telegraph Company, then and there objected and now objects; and now before final judgment in said cause, and during the same term at which said judgment complained of was rendered, the said Western Union Telegraph Company comes and excepts to so much of said judgment as sustains the said motion of the said plaintiff, and as sustains the several grounds or para-



graphs of said motion therein stated to be sustained by the court, and assigns error thereon.

In addition to the foregoing general assignment and specification of error this defendant further assigns error upon said judgment as follows.

1. Said judgment is erroneous in sustaining each of the paragraphs of said motion sustained upon the grounds therefor in each of said paragraphs stated. This assignment of error applies to each paragraph sustained with the same force and effect as if separately made as to each such paragraph sustained.

2. Said judgment is erroneous in sustaining each of the paragraphs of said motion sustained in that thereby there are stricken from defendant's answer allegations which this defendant has the right to make in its defense in said cause, and which it is entitled to prove in its defense upon trial of the cause. This assignment of error applies to each paragraph sustained and to each portion of said answer stricken with the same force and effect as if separately made as to each paragraph sustained and as to each portion of the answer stricken.

3. Said judgment is erroneous in sustaining each of said paragraphs of said motion sustained in that thereby this defendant is deprived of its right to plainly, fully and distinctly answer the petition in the cause. This assignment of error applies to each paragraph sustained with the same force and effect as if separately made as to each such paragraph sustained.

4. Said judgment is erroneous in sustaining the 2nd, 3rd, 4th and 5th paragraphs of said motion, and each of them, upon the grounds that each of the portions of paragraph 1 of said answer stricken thereby is responsive to, and is a portion of defendant's lawful defense to, the allegations of said petition and paragraph 1 thereof; each of said portions of paragraph 1 of the answer so stricken is coupled with, and is a part of, other portions of the first paragraph of the answer which are not stricken, and limit and qualify admissions made in the portions of paragraph 1 of the answer not stricken. This assignment of error applies to each paragraph 2, 3, 4 and 5 of the motion, and to each portion of paragraph 1 of the answer stricken, with the same force and effect as if separately made as to each of said paragraphs of said motion, and as to each of the portions of said answer stricken.

5. Said judgment is erroneous in sustaining the 6th, 7th, 8th and 9th paragraphs of said motion, and each of them, upon the grounds that each of the portions of paragraph 1 of said answer stricken thereby is responsive to, and is a portion of defendant's lawful defense to the allegations of said petition and of paragraph 4 thereof; each of the portions of paragraph 4 of the answer so stricken is coupled with, and is a part of, other portions of the 4th paragraph of the answer which are not stricken, and limit and qualify admissions made in the portion of paragraph 4 of the answer not stricken. This assignment of error applies to each paragraph 6, 7, 8 and 9

of the motion, and to each portion of paragraph 4 of the answer stricken, with the same force and effect as if separately made as to each of said paragraphs and as to each of the portions of said answer stricken.

6. Said judgment is erroneous in sustaining the 10th paragraph [fol. 208] of said motion upon the ground that the portion of paragraph 5 of the answer stricken thereby is responsive to, and is a portion of defendant's lawful defense to, the allegations of said petition and of paragraph 5 thereof; the portion of paragraph 5 of the answer so stricken is coupled with, and is a portion of, other portions of the 5th paragraph of the answer which are not stricken, and limit and qualify admissions made in the portion of paragraph 5 of the answer not stricken.

7. Said judgment is erroneous in sustaining the paragraphs of the motion numbered 11, 12, 13, 14, 15, 16, 17, 18, 21, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36 and 37 and each of them upon the grounds that each of the portions of Paragraph 6 of said answer stricken thereby, is responsive to, and is a portion of defendant's lawful defense to, the allegations of said petition and paragraph 6 thereof; each of said portions of paragraph 6 of said answer so stricken is coupled with, and is a part of, other portions of the 6th paragraph of the answer which are not stricken, qualify, limit or amplify the same, and should be retained in said answer in connection with as much thereof as is not stricken as well as because defendant is entitled to have them remain in the answer when considered separately by themselves. This assignment of errors applies to each paragraph of said motion numbered 11, 12, 13, 14, 15, 16, 17, 18, 21, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36 and 37, and to each portion of paragraph 6 of the answer stricken, with the same force and effect as if separately made as to each of said paragraphs of said motion and as to each of the portions of said answer stricken.

8. Said judgment is erroneous in sustaining paragraph 38 of said motion upon the ground that the portion of paragraph 7 of said answer stricken thereby is responsive to and is a portion of defendant's lawful defense to, the allegations of said petition and of paragraph 7 thereof.

[fol. 209] 9. Said judgment is erroneous in sustaining the paragraphs of said motion numbered 39, 40 and 41, and each of them, upon the grounds that each of said portions of paragraph 8 of the answer stricken thereby is responsive to, and is a portion of defendant's lawful defense to, the allegations of said petition and paragraph 8 thereof; each of said portions of paragraph 8 of the answer so stricken is coupled with, and is a part of, other portions of the 8th paragraph of said answer which are not stricken and limit and qualify admissions, and amplify allegations, made in the portions of paragraph 8 of said answer not stricken. This assignment of error applies to each paragraph 39, 40 and 41 of the motion, and to each portion of paragraph 8 of the answer stricken, with the same force

and effect as if separately made as to each of said paragraphs of said motion, and as to each of the portions of said answer stricken.

10. Said judgment is erroneous in sustaining paragraph 42 of said motion upon the ground that paragraphs 9, 10 and 11 of the answer, and each of them, state facts which defendant is entitled to plead in response to the petition and as a defense and defenses to plaintiff's claim and to their petition.

And the said Western Union Telegraph Company within 30 days of the rendition of said judgment, and during the term at which it was rendered, excepts thereto in so far as the same sustains the plaintiffs' motion to strike its answer and to strike portions thereof, and assigns error thereon, and tenders this, its bill of exceptions pendente lite for the purpose of being made a part of the record, and prays that the same be certified to be true by the Judge and be ordered filed and placed on the record as a part of the record in said cause.

W. L. Clay, Brewster, Howell & Heyman, Attys. for Western Union Tel. Co.

I do certify that the foregoing bill of exceptions pendente lite is true and the same is hereby ordered filed and made a part of the record in this cause.

In open court this Dec. 30, 1920, during the November Term, 1920, of Fulton Superior Court.

J. T. Pendleton, Judge S. C. A. C.

[File endorsement omitted.]

---

[fol. 210] STATE OF GEORGIA,  
County of Fulton:

IN FULTON SUPERIOR COURT

AMENDED ANSWER—Filed Jan. 13, 1921

Now comes the Western Union Telegraph Company, hereinafter sometimes styled defendant, and with leave of the court first had and obtained amends its answer theretofore filed in the above cause as follows:

XII. Defendant admits that the W. & A. R. R. is a railway communication extending from the City of Atlanta in the State of Georgia, through the counties of Fulton, Cobb, Bartow, Gordon, Whitfield and Catoosa in the State of Georgia, and the County of Hamilton in the State of Tennessee to the City of Chattanooga, Tenn., except as herein admitted each and every allegation of paragraph 1 of the petition in this cause is denied.

XIII. The allegations of the 4th paragraph of the petition and each of them are denied.

XIV. The allegations of the 5th paragraph of the petition and each of them are denied.

XV. Answering the 6th paragraph of the petition defendant admits that it is maintaining and operating along the W. & A. R. R. between the City of Atlanta, Ga., and the City of Chattanooga, Tenn., telegraph lines, poles, wires and other appurtenances employed by it in the conduct of its telegraph business, the location of which is generally described in defendant's original answer. It denies that the land and easements occupied or taken for construction, maintenance, operation and use of its said telegraph lines, poles, wires and other appurtenances employed by defendant in the conduct of its telegraph business is the right of way or the property of the W. & A. R. R. or of the complainants in this cause or either of them. Except as herein denied this defendant for the want of sufficient information [fol. 211] can neither admit nor deny what title, ownership, or interest the complainants or either of them have in the land upon, over or through which the said W. & A. R. R. is constructed or the property denominated in the petition as right of way of the W. & A. R. R. and requires strict proof thereof.

Defendant denies that its said use and occupation of the land, easements and rights taken and used by it for the construction, maintenance and operation of its telegraph lines, poles, wires and other appurtenances employed by it in the conduct of its telegraph business is without authority from the State of Ga.

Defendant admits that its said use and occupation of the land, easements and rights taken, used and occupation of the land, easements and rights taken, used and occupied by it for the construction, maintenance and operation of its telegraph lines, poles, wires and other appurtenances employed by it in the conduct of its telegraph business is contrary to the will and consent of the N. C. & St. L. Ry., as lessee of the W. & A. R. R.

Defendant denies that its use and occupation of the land, easements and rights taken, used and occupied by it for its telegraph lines, poles, wires and other appurtenances employed by it in the conduct of its telegraph business is an unlawful encroachment upon said right of way; but admits that its taking, use and occupation of said land, easements and interest are adverse uses thereof.

XVI. Defendant amends sub-division (3) of paragraph VI of its original answer by substituting for the second paragraph of said sub-division (3) which begins on page 20 of said answer with the words "thereupon W. L. Mitchell," and ending on page 21 with the words, "instructions for the carrying out of the contract so made," the following:

Thereupon W. L. Mitchell the chief engineer of the W. & A. R. R. on October 11th, 1850 wrote Garst & Bean a letter, copy of which [fol. 212] is hereto attached in Exhibit 1, offering among other

things to grant to said Garst & Bean the use of right of way for the construction, maintenance and operation of such lines of telegraph, without limit which offer was for an easement for said telegraph lines without limit and perpetual in its character. Said proposition and offer were accepted by Garst & Bean on October 11th, 1850. Thereupon the chief engineer of the W. & A. R. R. issued an order that so soon as the Telegraph Company should be sufficiently organized to warrant the undertaking the resident engineer and road-master should make all necessary arrangements for the carrying out of the contract made by said offer and its acceptance, and thereafter telegraph posts were erected and the work progressed and the line was constructed and established. Hereto attached as Exhibit 1, which is in lieu of Exhibit 1 attached to the original answer, is an extract from the report of William L. Mitchell as Chief Engineer of the W. & A. R. R. to His Excellency, George W. Towns, Governor of Ga., dated September 30th, 1851, in which is set forth the said proposal by Garst & Bean; the said letter of October 11, 1850, to them from said William L. Mitchell, chief engineer of the W. & A. R. R. the acceptance by Garst & Bean Oct. 11, 1850, of the offer contained in said letter of said Chief Engineer; and the report by said chief engineer of his order thereupon given and his statement and report of the progressive construction of said lines of telegraph. Leave of reference to said Exhibit 1, is prayed with the same force as if herein fully set forth.

XVII. Defendant amends sub-division 4 of the paragraph 6 of its original answer by substituting therefor the following:

Defendant alleges that during the year 1855 the Augusta, Atlanta and Nashville Magnetic Tel. Co., executed and delivered its several mortgages to William Pylus, and Samuel M. Scott, and to J. Washburn & Co., and to Samuel Clarke, respectively, conveying its real and personal property situate in the States of Tennessee and Georgia, [fol. 213] consisting of telegraph instruments, right of way, telegraph line, posts, wires insulators and office furniture, etc., which were recorded in the States of Tennessee and Ga. A copy of each of said mortgages and of the certificate of record thereof in various counties is hereto attached marked Exhibits 15, 16 and 17 respectively. On information and belief defendant alleges that the said mortgages covered the line of telegraph and easements therefor along the W. & A. R. R. from Atlanta to Chattanooga described in the original answer in this cause, as well as properties and easements along the Georgia Railroad & Banking Company in the State of Ga. Defendant alleges that thereafter in a suit brought by Camp & Hammett against the A. A. & N. M. Tel. Co. in the Superior Court of Cobb County a judgment or decree was rendered under which all of the properties of the A. A. & N. M. Tel. Co., including its telegraph lines and rights of way along the W. & A. R. R. were sold. All of the records of Cobb Superior Court were destroyed during the Civil War sometime between the year 1860 and the year 1866, for which reason the original pleadings and judgment in said suit and copies thereof, which were among the papers destroyed cannot now be obtained.

For like reason no record of any deed by any officer or person conveying said properties or the report of such sale can be procured. Defendant attaches hereto as Exhibits 18 and 19 are copies of deeds made by Robert Wiggins as the Sheriff of Richmond County, Ga., and by John Y. Flowers as the Sheriff of DeKalb County, conveying the properties of said A. A. & N. M. Tel. Co., in the Counties of Richmond, Ga., and of DeKalb Ga., in each of which is a recital by the said Shffs., that the sale was made under and by virtue of an execution or writ of fieri facias issued from the Superior Court of Cobb County, Ga., in the suit of Camp & Hammett against the A. A. & N. M. Tel. Co. To said Exhibits leave of reference is here made with the same effect as if herein fully set forth.

Upon information and belief defendant alleges that under said execution issued out of the Superior Court of Cobb County, Ga., in [fol. 214] said suit brought by Camp & Hammett, all of the properties, telegraph lines and rights of way of the A. A. & N. M. Tel. Co., situate in the State of Ga., along the W. & A. R. R., as well as along the Georgia Railroad & Banking Co., including perpetual easements and right of way for said lines of telegraph, were sold and conveyed to A. D. Hammett.

Upon information and belief defendant alleges that under said judgment or decree of the Superior Court of Cobb County, Ga., in the suit brought by Camp & Hammett, or under a judgment and decree obtained about the same time in some court in Tennessee, the properties, telegraph lines and easements of said A. A. & N. M. Tel. Co., were sold and conveyed to G. L. Willy.

Because of the loss of original papers and the destruction of county records during the Civil War during the years 1861 and 1865 and the long lapse of time since that date defendant is unable to attach copies of conveyances of said properties to said A. D. Hammett or to George L. Willy except those hereto attached as exhibits.

XVIII. Defendant amends subdivision 5 of paragraph 6 of its original answer by substituting therefor the following:

(5) On the 12th day of August 1858, said Alvin D. Hammett executed and delivered to William S. Morris, et al., all of said telegraph lines, properties and easements formerly belonging to the A. A. & N. M. Tel. Co., from Chattanooga in the State of Tennessee to Augusta in the State of Georgia, copy of which is attached to defendants original answer as Exhibit 2, to which leave of reference is prayed with the same force and effect as if the same were hereto set forth.

XIX. Defendant amends subdivision 9 of Paragraph 6 of its original answer by substituting therefor the following:

On July 12th, 1866, the American Telegraph Co., entered into an agreement with the W. U. Tel. Co., this defendant, a copy of which agreement is attached to defendant's original answer as Exhibit 6. Defendant leave to refer thereto with the same force and effect as [fol. 215] if herein incorporated. In and by said agreement the said American Telegraph Co., granted and conveyed to the W. U.

Tel. Co., this defendant, the right to take the possession, use, management and control of all of the lines of telegraph owned, leased, operated and controlled by the American Tel. Co., together with all of the instruments, poles, insulators, wires and other materials, grants, property and right to property of every description, and all franchises, and to use, operate and enjoy the same. The respective boards of directors of the said American Telegraph Co., and of the W. U. Tel. Co., subsequently ratified and approved this said agreement, and under and by virtue of said agreement so ratified and confirmed all of the properties of the American Telegraph Co., including the line of telegraph, poles, wires, etc., and perpetual easements therefor situate along the W. & A. R. R., as described in defendant's original answer from Atlanta, Ga., to Chattanooga, Tennessee, were conveyed in fee simple to the W. U. Tel. Co.

W. L. Clay, Brewster, Howell & Heyman, Defts. Attys.

#### EXHIBIT 1 TO AMENDED ANSWER

On the 10th October, 1850, Messrs. Garst & Bean proposed to organize a company of stockholders and to build for them a telegraph line from Atlanta to Nashville, which was subsequently made to embrace the Georgia Railroad and to extend to Augusta, expressing a desire, at the same time to procuring the aid and countenance of the W. & A. R. R. of the State of Ga., The Company is called the Augusta, Atlanta & Nashville Tel. Cop., Mr. Garst retired and Mr. Bean prosecuted the enterprise alone. The following correspondence will explain the precise terms of the contract between the Road and [fol. 216] the Tel. Co.:

Chief Engineer's Office, W. & A. R. R.

Atlanta, Oct. 11, 1850.

GENTLEMEN: I have given much reflection to the subject of your note of yesterday, and I have had full and free conversations with his Excellency Geo. W. Towns, upon the subject and we are fully satisfied, not only from the nature of the telegraph but from the experience of other roads, that there is no appendage more valuable in the efficient management of a railroad than a telegraph line, and we have come to the conclusion to submit to you this proposition.

1. To furnish and erect the posts from Atlanta to Chattanooga which shall be 24 feet long with four inches in diameter at the little end, and be planted four feet in the ground.

2. To grant you the use of our right of way for the telegraph company, and to pass your offices and materials along the road free of charge.

3. For and in consideration of the foregoing, the W. & A. R. R. is to receive the sum of Five Thousand dollars to be placed to its



credit upon the books of the Telegraph Company, and instead of interest on that sum, it is to receive dividends as they may be declared from time to time, and to be represented in the meetings of the company to that amount by the Chief Engineer, or such other person as may be appointed to represent the same.

4. And in further consideration of the foregoing services and grant, all the telegraph offices between Atlanta and Nashville erected by the Company shall be subject to the use of said road free of charge, and said company shall erect as many offices as the road may require in addition to the regular offices of the Company, but the latter shall be at the expense of the road.

Yours respectfully, Wm. Mitchell, Chief Engineer.

[fol. 217] Mr. David W. Garst and Mr. James M. Bean, Atlanta, Ga.

Atlanta, Ga., Oct. 11, 1850.

SIR:- We hereby accept the proposition submitted in yours of this date.

Yours respectfully, D. W. Garst, J. M. Bean.

W. L. Mitchell, Esq., Chief Engineer, etc., Atlanta, Ga.

Whereupon, I passed an order, that so soon as the telegraph Company is sufficiently organized to warrant the undertaking, the Resident Engineer and Roadmaster make all the necessary arrangements for carrying out our part of the foregoing contract: but we did not commence plaining the posts till last May, and from a desire to economise as much as possible and do the work with our repairing parties so as not to interrupt their regular duties, the work has progressed slowly, but all the posts have been delivered and half or more are planted, and the wire stretched beyond Kingston, and a branch line had been established from Kingston to Rome and an office placed there.

Our out-lay of money for this job has been but little beyond the costs of the posts, and they have been delivered at fifteen cents apiece. We expect the line to be in working order as far as Chattanooga in a month or two more, when we expect to be able to infuse additional efficiency in the management and render the anxiety felt for the tardy trains less painful.

[fol. 218]

#### EXHIBIT 15 TO AMENDED ANSWER

This indenture, made and entered into this twenty-ninth day of January, Eighteen Hundred and fifty-five, between the Augusta, Atlanta and Nashville Magnetic Telegraph Company of the one part and William Pylus and Samuel M. Scott, of the City of Nashville of the Second Part,

Witnesseth, that the said Augusta, Atlanta and Nashville Magnetic Telegraph Company, for and in consideration of the sum of

five dollars and other considerations hereinafter mentioned, hath bargained, sold, aliened, conveyed and confirmed, and by these presents, doth bargain, sell, alien, convey and confirm unto the said William Pylus and Samuel Scott, all the property both real and personal situated in the State of Tennessee and Georgia belonging to said Telegraph Company, consisting of twenty-five telegraphing instruments, the right of way, all the office fixtures, furniture, all the wire upon said line, the posts, insulations, etc.

To have and to hold the said property to the said William Pylus and Samuel Scott, their heirs and representatives forever. And the said Augusta, Atlanta and Nashville Magnetic Telegraph Company covenants and agrees with said William Pylus and Samuel Scott, that it will warrant and defend the title to said property to them against the lawful claims of all persons whatever.

But this covenant is made upon the following terms and conditions that is to say, the said August, Atlanta & Nashville Magnetic Telegraph Company is indebted to said William Pylus in the sum of Twenty-five hundred dollars due by note dated Nashville, January 29, 1855, signed by E. R. Mills President of said Company, due four months after date, and payable four months after date at the Planters Bank of Tennessee at Nashville. And the said Magnetic Telegraph Company is also indebted to said Samuel M. Scott, in the sum of Three Hundred and Seventy-five (36/100) Dollars by note bearing same date as Pylus' said note, and due and payable at the same time and place.

[fol. 219] Now, this indenture witnesseth, that if the said Augusta, Atlanta and Nashville Magnetic Telegraph Company shall well and truly pay and discharge said sums of money as they become due and payable according to the tenor and effects of said notes then this conveyance is to be void and of no effect, otherwise to remain in fully force and virtue according to the intent and meaning thereof.

In testimony whereof, the said E. R. Mills, President of said Augusta, Atlanta and Nashville Magnetic Telegraph Company, and William Saffin, Secretary, pro tempore, of said Company, have hereunto set their hands and seals, the day and year first above written. The said Corporation having no seal.

E. R. Mills, President A., A. & N. M. T. Co. (L. S.) Wm. Saffin, Sec. Pro Tem. (Seal.)

STATE OF TENNESSEE,

Davidson County:

Personally appeared before me, F. R. Cheatham, Clerk of the County Court of said county, the within named E. R. Mills, and William Saffin, President and Secretary pro tem. of the Augusta, Atlanta & Nashville Magnetic Telegraph Company, with whom I am personally acquainted and acknowledged the foregoing deed to be the act and deed of the said Magnetic Telegraph Company for the purpose therein contained, witness my hand at office this 29th day of January, 1855.

F. R. Cheatham, Clerk, By L. P. Cheatham, D. C.

STATE OF TENNESSEE,  
County of Davidson,  
City of Nashville:

Be it remembered that on the 2nd day of February 1855, before me Egbert A. Raworth, a commissioner in and for the State of Tennessee, [fol. 220] duly commissioned and authorized in and for the State of Georgia, to take acknowledgments and proof of Deeds and other instruments of writing to be used or recorded in the said State of Georgia, and to administer oaths and affirmations, personally appeared E. R. Mills, Prest., and Wm. Saffin, Secty., of the A. A. & N. Telegraph Co. to me personally known, to be the persons described in and whose names are subscribed to the foregoing instrument of conveyance, and in their official capacity as representatives of said company acknowledged that they executed the same as their act and deed for the uses and purposes and on the conditions therein specified.

In testimony whereof, I have hereunto set my hand and affixed my official — at my office in the city of Nashville, the day and year first above written.

Egbert A. Raworth, Commissioner. (Seal.)

Recorded February 22nd, 1855.

STATE OF GEORGIA,  
Richmond County:

Office Clerk Superior Court

I hereby certify that the foregoing three pages contain a true and correct copy of the Deed from the Augusta, Atlanta & Nashville Magnetic Telegraph Company, to William Pylus and Samuel M. Scott, as taken from Deed Book 2 K's pages, 119-120.

Witness my official signature and the seal of said Court, this 13th day of May 1915.

Daniel Kerr, Clerk Superior Court, Richmond Co., Ga.  
(Seal Superior Court, Richmond.)

[fol. 221] EXHIBIT 16 TO AMENDED ANSWER

This indenture, Made and entered into this twenty ninth day of January, Eighteen Hundred and fifty five, between the Augusta, Atlanta and Nashville Magnetic Telegraph Company, of the one part, and J. Washburn & Co. of the City of Worcester, Massachusetts, of the other part,

Witnesseth, that the said Augusta, Atlanta & Nashville Magnetic Telegraph Company for and in consideration of the sum of five dollars and the other considerations hereinafter mentioned, hath bargained, sold, aliened, conveyed and confirmed and by these pres-

ents doth bargain sell, alien, convey and confirm unto the said J. Washburne & Co. all the property both real and personal, situated in the States of Tennessee and Georgia, belonging to said Telegraph Company, consisting of twenty five telegraphing instruments, the rights of way, all the office fixtures and furniture, all the wire upon said line, the posts, insulators, etc.

To Have and to Hold the said property to the said J. Washburn & Co. Their heirs and representatives forever. And the said Augusta, Atlanta and Nashville Magnetic Telegraph Company, covenants, and agrees with said J. Washburn & Co., that it will warrant and defend the title to said property to them, against the lawful claims of all persons whatever.

But this conveyance is made upon the terms and conditions hereafter mentioned, that is to say, the said Augusta-Atlanta and Nashville Magnetic Telegraph Company is justly indebted to the said J. Washburn & Co. in the sum of one thousand three hundred and fifty dollars by note dated Nashville, January 29th, 1855, signed by E. R. Mills, the President of said Telegraph Company due four months after date, and payable at the City Bank of New York. Now this indenture witnesseth, that if said Augusta, Atlanta and Nashville Telegraph Company shall well and truly pay and discharge said sum of money when it is due and payable according to the tenor and effect of said note, then this conveyance is to be void and [fol. 222] of no effect, otherwise to remain in full force and virtue according to the true intent and meaning hereof.

In Testimony Whereof, E. R. Mills, President of said Augusta, Atlanta and Nashville Magnetic Telegraph Company and William Saffin, Secretary pro tempore, have hereunto set their hands and seal the said Corporations having no seal, the day and year first above written.

E. R. Mills, Prest. A., A. & N. Tl. Co. (L. S.) Wm. Saffin,  
Sec. Pro Tem. (Seal.)

#### STATE OF TENNESSEE.

##### Davidson County:

Personally appeared before me F. R. Cheatham, Clerk of the County Court of said County, the above named, E. R. Mills and William Saffin, President and Secretary of the Augusta, Atlanta and Nashville Magnetic Telegraph Company, with whom I am personally acquainted and acknowledged the foregoing deed to be the act and deed of the said Telegraph Company for the purposes therein contained.

Witness my hand at office this 29th day of January 1855.

F. R. Cheatham, Clerk, by L. P. Cheatham, D. C.

STATE OF TENNESSEE,  
County of Davidson,  
City of Nashville:

Be it remembered that on this 2nd day of February, 1855, before me Egbert A. Raworth, a commissioner in and for the State of Tennessee, duly commissioned and authorized by the Governor of the State of Georgia to take acknowledgement and proof of Deeds and other instruments of writing, to be used or recorded in said State of Georgia, and to administer oaths and affirmations personally appeared E. R. Mills, Prest. and Wm. Saffin, Secretary of the A. A. & N. Telegraph Company to me personally known, to be the persons described in and whose names are subscribed to the foregoing instrument [fol. 223] of conveyance, and who in their official capacities, as representatives of said Company acknowledged that they executed the same as their act and deed for the uses and purposes and on the conditions therein specified.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at my office in the City of Nashville the day and year first above written.

Egbert A. Raworth, Commissioner. (Seal.)

Recorded, February 22, 1855.

STATE OF GEORGIA.

Richmond County:

Office Clerk Superior Court

I hereby certify that the foregoing three pages contain a true and correct copy of the Deed from the Augusta, Atlanta, Nashville Magnetic Telegraph Company to J. Washburn Company, as taken from Deed Book 2 K's Folios 12, 1-122.

Witness my official signature and the seal of said Court this 13th day of May 1915.

Daniel Kerr, Clerk Superior Court, Richmond Co., Ga.  
(Seal Superior Court, Richmond.)

---

EXHIBIT 17 TO AMENDED ANSWER

This indenture, made and entered into this seventeenth day of March, Eighteen Hundred and fifty five between the Augusta, Atlanta, and Nashville Magnetic Telegraph Company of the one part and Samuel Clerk of the County of Davidson and State of [fol. 224] Tennessee, of the other part, Witnesseth:

That the said Augusta, Atlanta and Nashville Magnetic Telegraph Co., for and in consideration of the sum of Five Dollars in hand paid, and the other consideration hereinafter mentioned, have this day bargained, sold, aliened and conveyed, and do hereby bargain,

sell, alien and convey unto the said Samuel Clarke, the property of the Company in the States of Tennessee and Georgia, consisting of the wire on said line, also the posts, insulators, office furniture and twenty telegraphing instruments at the different offices of said company. To have and to Hold the same to the said Samuel Clark his heirs and representatives.

The said telegraph company also warrants the title to said property to the said Samuel Clark and agrees to defend it against the lawful claims of all persons whatever except as against J. Washburn & Co. and William Pylus and Saml. Scott, to whom said property is already mortgaged, by Deed registered at Nashville, Tenn., and Augusta, Ga.

But this deed is made upon the express condition, that if the said Augusta, Atlanta & Nashville Magnetic Telegraph Co., or its representatives do pay to the said Samuel Clark or his representatives the sum of Three Hundred and Sixty Dollars, for which the said Company by its president E. R. Mills, has this day executed its note, due ninety days after date, at the maturity of said note, then this deed shall be void otherwise to remain in full force and effect.

In Testimony Whereof, E. R. Mills, President of said Company, has hereunto set his hand and seal, the Said Company having no seal, at Nashville this 17th day of March, 1855.

E. R. Mills, President. (Seal.)

[fol. 225] STATE OF TENNESSEE,  
Davidson County:

Personally appeared before me F. R. Cheatham, Clerk of the County Court of said County, the above named E. R. Mills, President, of the Augusta, Atlanta and Nashville Magnetic Telegraph Company, with whom I am personally acquainted, and acknowledged the foregoing Mortgage to — the act and deed of said company, for the purposes therein contained. Witness my hand at office this 14th day of March, 1855.

F. R. Cheatham, Clk., by J. T. Faulkner, D. C.

STATE OF TENNESSEE,  
Davidson County:

Register's Office, March 23, 1855.

I, Phinlias Garrett, Register for said County do hereby certify that the foregoing Mortgage and Certificate are duly registered in my Office in Book No. 19, page 561, and that they were received this day at 10:10/60 O'clock A. M., and entered in note book 3 page 178.

P. Garrett.

Recorded May 1st, 1855.

STATE OF GEORGIA,  
Richmond County:

Office Clerk Superior Court

I hereby certify that the foregoing two pages contain a true and correct copy of the deed from the Augusta, Atlanta and Nashville Magnetic Telegraph Company to Samuel Clark, as taken from Book of Deeds, 2 K's Folios 263-264.

Witness my official signature and the seal of said court this 13th [fol. 226] day of May, 1915.

Daniel Kerr, Clerk Superior Court, Richmond Co., Ga. (Seal Superior Court, Richmond Co.)

---

EXHIBIT 18 TO AMENDED ANSWER

STATE OF GEORGIA,  
Richmond County:

Whereas, in Obedience to a Writ of Fieri Facias, issued from the Superior Court of the County of Cobb, at the suit of Camp & Hammett against the Augusta, Atlantic and Nashville Telegraph Company, Robert Wiggins, Sheriff of the County of Richmond, did lately seize the property hereinafter described as the property of the said Telegraph Company and after the same being duly advertised agreeably to law, did on the seventh day of June, in the year Eighteen Hundred and fifty nine at the place of Public Sale in the County of Richmond expose the same at public outcry, when A. D. Hammett being the highest bidder the same was knocked off to him at the price of twenty dollars. Nos, this deed made on the Seventh day of June in the year Eighteen Hundred and fifty-nine, between the said Robert Wiggins, Sheriff as aforesaid of the one part and the said A. D. Hammett, of the other part, Witnesseth; that the said Robert Wiggins, Sheriff as aforesaid, for and in consideration of the sum of twenty dollars to him in hand paid by the said A. D. Hammett at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained and sold and by these presents, doth grant, bargain, sell, and convey, so far as the Office of Sheriff authorizes him unto the said A. D. Hammett, his heirs and assigns, all the wires, posts, insulators, etc., embracing every appurtenance belonging to and being the property of the said Telegraph Company in the limits of the County of Richmond. [fol. 227] mond.

Together with all and singular the rights, members and appurtenances thereof; and also all the estate, right, title, interest, claim and demand of the said Telegraph Company in law, equity or otherwise whatsoever of in or to the same.



To Have and to Hold the said premises and every part thereof, unto the said A. D. Hammett, his heirs and assigns in as full and ample manner as the said Telegraph Company or their heirs and assigns, did hold and enjoy or might have held and enjoyed the same had it not been seized and sold under the execution aforesaid.

In Witness Whereof, the said Robert Wiggins Sheriff aforesaid, hath hereunto set his hand and affixed his seal the day and year first aforesaid.

Robert Wiggins, Sheriff R. C. (Seal.)

Signed, Sealed and Delivered in the presence of: Thad. Oakman, Alpheus M. Rodgers, Not. Pub. R. C.

Recorded March 26th, 1867.

STATE OF GEORGIA,  
Richmond County:

Office Clerk Superior Court

I hereby certify that the foregoing two pages contain a true and correct copy of the deed from Augusta, Atlantic and Nashville Telegraph Company, by Robert Wiggins, Sheriff, to A. D. Hammett, as taken from Deed Book 2 V's, folio 143.

Witness my official signature and the seal of said Court, this 13th day of May, 1915.

Daniel Kerr, Clerk Superior Court, Richmond Co., Ga. (Seal  
Superior Court, Richmond Co.)

[fol. 228]      EXHIBIT 19 TO AMENDED ANSWER

GEORGIA,  
DeKalb County:

Whereas In obedience to a writ of Fieri Facias issued from the Superior Court of the County of Cobb at the suit of against the Augusta Atlanta & Nashville Telegraph Company John Y. Flowers, Sheriff, Sheriff of the County of DeKalb did lately seize the property hereinafter described as the property of the said Augusta, Atlanta & Nashville Magnetic Telegraph line and after the same being duly advertised agreeable to law did on the 4th day of January in the year eighteen hundred and fifty nine at the place of public sale in the County of DeKalb expose the same at public outcry, when Abner D. Hammett being the highest bidder the same was knocked off to him at the price of Five Dollars.

Now this made the 4th day of January in the year Eighteen — and fifty nine between the said John Y. Flowers Sheriff as aforesaid of the one part and the said A. D. Hammett of the other part.

Witnesseth: That the said John Y. Flowers, Sheriff as aforesaid for and in consideration of the sum of Five Dollars to him in hand paid by him the said A. D. Hammett at and before the sealing and delivery of these presents the receipt whereof is hereby acknowledged hath granted, bargained, and sold and by these presents doth grant, bargain, sell and convey so far as the office of sheriff authorizes him unto the said A. D. Hammett his heirs and assigns all the property pertaining and belonging to the said Augusta, Atlanta & Nashville Magnetic Telegraph Line situate in the County of Dekalb, consisting of the post, wire and machinery and all the appurtenances right of way franchise Cia belonging thereto together with all and singular the rights members and appurtenances thereof, and also all the estate, right, title interest claim and demand of the said Augusta, Atlanta & Nashville Company in law equity or otherwise, whatsoever, of, in or to the same.

[fol. 229] To have and to hold the said premises and every part thereof unto the said A. D. Hammett, his heirs and assigns in as full and ample a manner as the said Company or heirs and assigns did hold and enjoy or might have held and enjoyed the same had it not been seized and sold under the execution aforesaid.

In Witness Whereof, the said John Y. Flowers, Sheriff aforesaid, hath hereunto set his hand and affixed his seal, the day and year first aforesaid.

John Y. Flowers, Sheriff Dekalb County.

Signed, sealed and delivered in presence of: The word Winningham stricken and John Y. Flowers inserted before assigned. T. B. George, Alex. Johnson, Clk., I. C.

Registered March 14, 1867. J. M. Hawkins, Clerk.

Recorded in the office of the clerk of the Superior Court of Dekalb County, Georgia, Deed Book P page 535.

GEORGIA,

Fulton County:

Before the undersigned a Notary Public in and for Fulton County, Ga., personally appeared R. F. Ragsdale, who being duly sworn says that he is the Superintendent of the W. U. Tel. Co., and authorized to act for it in this matter; that at the time of filing the original plea or answer defendant did not omit any facts or defence set out in the foregoing amended plea or answer for the purpose of delay, and that the amendment is not now offered for delay. Deponent further says that the facts set forth in said amendment are true so far as the same are within his knowledge and as to allegations not within his knowledge, he believes them to be true.

[fol. 230]

R. F. Ragsdale.

Sworn to and subscribed before me. B. F. Bennett, N. P.  
Fulton Co., Ga. (N. P. Seal.)

The amendment is allowed subject to demurrer. This Jan. 13, 1921.

J. T. Pendleton, Judge S. C. A. C.

[File endorsement omitted.]

---

[fol. 231] FULTON SUPERIOR COURT, JANUARY TERM, 1921

[Title omitted]

AMENDED ANSWER OF W. U. TEL. CO.—Filed Jan. 13, 1921

Now comes the Western Union Telegraph Company, hereinafter sometimes styled defendant, and with leave of the court first had and obtained amends its answer heretofore filed in the above cause as follows:

XX. For further plea and answer defendant alleges that it is seized and possessed of title in fee simple to the telegraph lines mentioned in the petition in this cause and to perpetual easements for the construction, maintenance and operation thereof in, on over and through the lands on, over and through which they are situate, under the following grants, conveyances, contracts and muniments of title.

Defendant alleges that the State of Georgia has given and granted to this defendant and its predecessors in title under and through whom defendant claims, full power and authority to construct, reconstruct, maintain and operate in perpetuity the said lines of telegraph now owned and operated by defendant and referred to in the petition in this cause upon along, in, over and through said land; and the State of Georgia has granted and given to this defendant, and also to its predecessors in title under and through whom defendant claims, the easements and interest in said right of way and land necessary and useful for the construction, reconstruction, maintenance and operation in perpetuity of said lines of telegraph.

The permits and grants aforesaid from the State of Georgia to the predecessors in title of this defendant are:

1. An act of the General Assembly of the State of Georgia approved December 29th, 1847, entitled "An Act to authorize the construction of the Magnetic Telegraph, and providing for the protection of the same."

2. The contract between the State of Georgia and Garst & Bean of October 11, 1850 executed in behalf of the State of Georgia by William L. Mitchell Chief Engineer, which contract is set forth in the written proposal of said William L. Mitchell Chief Engineer to David W. Garst and James M. Bean dated October 11th, 1850, as more fully appears from Exhibit 1 attached to the amendment to defendant's answer filed on the — day of January, 1921, in which is embodied a copy of said written proposal and acceptance, to all of

which leave of reference is here prayed with the same force and effect as if herein fully set forth.

3. "An Act to incorporate the Augusta, Atlanta & Nashville Magnetic Telegraph Company," approved January 27, 1852, which said act ratified and confirmed the above mentioned contract between William L. Mitchell Chief Engineer of the Western & Atlantic Railroad and D. W. Garst and J. M. Bean, and in addition thereto by Section IX of said act gave the Augusta, Atlanta & Nashville Magnetic Telegraph Company power and authority without limit to put its fixtures upon and along any railroad belonging to the State of Georgia.

The conveyances from its predecessors in title under which this defendant claims to be possessed of said telegraph lines and perpetual easements and rights in the land upon through and over which the same are situate are:

[fol. 233] 4. During the year 1855 the Augusta, Atlanta & Nashville Magnetic Telegraph Co., executed and delivered its several mortgages to William Pylus and Samuel M. Scott; and to J. Washburn & Co.; and to Samuel Clark, respectively, conveying its real and personal property situate in the States of Tennessee and Georgia, consisting of telegraph instruments, right of way, telegraph lines, posts, wires, insulators and office furniture &c., which were recorded in the States of Tennessee and Georgia. A copy of each of said mortgages and of the certificate of record thereof in various counties is attached to the amendment to defendant's answer filed January —, 1921, marked Exhibits 15, 16, and 17, respectively. On information and belief defendant alleges that the said mortgages covered the line of telegraph and easements therefor along the Western & Atlantic Railroad from Atlanta to Chattanooga described in the petition in this cause, as well as properties and easements along the Georgia Railroad & Banking Company in the State of Georgia. Defendant alleges that thereafter in a suit brought by Camp & Hammett against the Augusta, Atlanta & Nashville Magnetic Telegraph Company in the Superior Court of Cobb County a judgment or decree was rendered under which all of the properties of the Augusta, Atlanta & Nashville Magnetic Telegraph Company, including its telegraph lines and rights of way along the Western & Atlantic Railroad were sold. All of the records of Cobb Superior Court were destroyed during the Civil War sometime between the year 1860 and the year 1866, for which reason the original pleadings and judgment in said suit and copies thereof, which were among the papers destroyed, cannot not be obtained. For like reason no record of any deed by any officer or person conveying said properties, or the report of such sale, can be procured. Attached to the amendment to Defendant's answer filed January —, 1921 as Exhibits 18 and 19 are copies of deeds made by Robert Wiggins as the Sheriff of Richmond County, Georgia, and by John Y. Flowers as the Sheriff of Dekalb County, conveying the properties of said Augusta, Atlanta & Nashville Magnetic Telegraph Company in the Counties of Richmond, Georgia and of Dekalb Georgia, in each of

which is a recital by the said sheriffs that the sale was made under and by virtue of an execution or writ of fieri facias issued from the Superior Court of Cobb County, Georgia in the suit of Camp & Hammett against the Augusta, Atlanta & Nashville Magnetic Telegraph Company. To all of said exhibits leave of reference is here made with the same effect as if herein fully set forth.

Upon information and belief defendant alleges that under said execution issued out of the Superior Court of Cobb County, Georgia, in said suit brought by Camp & Hammett, all of the properties, telegraph lines and rights of way of the Augusta, Atlanta & Nashville Magnetic Company, situate in the State of Georgia along the Western & Atlantic Railroad, as well as along the Georgia Railroad & Banking Company, including perpetual easements and rights of way for said lines of telegraph were sold and conveyed to A. D. Hammett.

Upon information and belief defendant alleges that under said judgment or decree of the Superior Court of Cobb County, Georgia, in the suit brought by Camp & Hammett, or under a judgment and decree obtained about the same time in some court in Tennessee, the properties, telegraph lines and easements of said Augusta, Atlanta & Nashville Magnetic Telegraph Company were sold and conveyed to G. L. Willy.

Because of the loss of original papers and the destruction of county records during the Civil War during the years 1861 and 1865 and the long lapse of time since that date defendant is unable to attach copies of conveyances of said properties to said A. D. Hammett, or to George L. Willy except those thereto attached as exhibits.

5. An agreement executed and delivered on the 12th day of August, 1858 by said Alvin D. Hammett to William S. Morris et al. copy of which is attached to defendant's original answer as Exhibit 2, to which leave of reference is prayed with the same force and [fol. 235] effect as if the same were herein set forth.

6. A deed dated September 1st, 1858, from the said Alvin D. Hammett to said William S. Morris et al., a copy of which is attached to defendant's original answer as Exhibit 3 to which leave of reference is prayed with the same force and effect as if the same were herein set forth.

7. A deed dated November 13th, 1858 from the said George L. Willy to William S. Morris et al., copy of which is attached to defendants original answer as Exhibit 4, to which leave of reference is prayed with the same force and effect as if the same were herein set forth.

8. A deed dated December 28th, 1859 from said William S. Morris et al. to the American Telegraph Company, a copy of which conveyance is attached to defendant's original answer as Exhibit 5, to which leave of reference is prayed with the same force and effect as if the same were herein set forth.

9. In the year 1861, soon after the outbreak of the Civil War in the United States when postal and telegraph communication between

the northern and southern states was interrupted, the stockholders and officers of the American Telegraph Company situate in the southern states assumed and took control of all of the properties of the American Telegraph Company, including those hereinabove alleged to have been conveyed to it by William S. Morris et al. and held and operated and managed the same under the name of the Confederated Telegraph Company to protect the property and the rights of all persons having an interest therein and continued so to hold said properties until the end of the Civil War, and thereupon they accounted to the American Telegraph Company for their stewardship and for their operation and management during the war of the said properties of the American Telegraph Company held, managed and operated by them, and executed and delivered to the American Telegraph Company a release, quit claim and assignment of all of the properties of the American Telegraph Company [fol. 236] which they had so held, managed and operated. Copies of said report dated May 10th, 1865 and said release, quit-claim and assignment dated June 20th, 1865 are hereto attached as Exhibits 20 and 21 respectively, to which leave of reference is prayed with the same force and effect as if herein set forth.

10. An agreement dated June 12th, 1866, between the American Telegraph Company and defendant, copy of which is attached to the original answer of defendant as Exhibit 6, to which leave of reference is prayed with the same force and effect as if the same were herein set forth. The respective boards of directors of said American Telegraph Company and of said Western Union Telegraph Company, defendant, subsequently ratified and approved said agreement.

11. A permit and grant hereinabove referred to from the State of Georgia to this defendant of full power and authority to construct, reconstruct, maintain and operate in perpetuity the said lines of telegraph now owned and operated by defendant and referred to in the petition in this cause upon, along, in, over and through said right of way is a contract dated August 18th, 1870, between the Western Union Telegraph Company and the State of Georgia, a copy of which is attached to the original answer of defendant as Exhibit 7, and to which leave of reference is prayed with the same force and effect as if herein set forth.

12. A permit and grant hereinabove referred to from the State of Georgia to this defendant of full power and authority to construct, reconstruct, maintain and operate in perpetuity the said lines of telegraph referred to in the petition in this cause upon, along, in over and through said right of way is "An Act to empower and authorize telegraph companies in this State to construct their lines upon the right of way of the several railroad companies in this State," approved August 26th, 1872.

[fol. 237] This defendant alleges that it is seized and possessed of title in fee simple to said telegraph lines, and to the perpetual easements necessary for the construction, maintenance and operation thereof herein above mentioned, under the foregoing muniments of title taken together as a whole; and also under the aforesaid act of

the General Assembly of Georgia of December 29th, 1847 considered by itself and the right and title thereunder acquired by defendant's predecessors in title as hereinabove stated transferred by successive assignees into the American Telegraph Company, and by the latter transferred to this defendant as above alleged; and also under the contract between Garst & Bean and the State of Georgia hereinabove alleged taken by itself, and the right and title thereunder acquired by Garst & Bean and successively transmitted through the several assignees and successors in title above mentioned to the American Telegraph Company and by it transmitted to defendant as above alleged; and also under the Act of the General Assembly of Georgia of January 27th, 1852 above mentioned taken by itself, and the right and title thereunder acquired by the Augusta, Atlanta & Nashville Magnetic Telegraph Company, successively transmitted by the several assignees and successors in title above mentioned to, the American Telegraph Company, and by it transmitted to this defendant as above alleged; and also under the aforesaid agreement and conveyance from the American Telegraph Company to defendant hereinabove alleged taken by itself; and also under the contract of August 18th, 1870, between the State of Georgia and defendant hereinabove alleged taken by itself; and also under the act of August 26th, 1872 hereinabove alleged taken by itself.

Because of the facts herein set forth, this defendant says that neither the said plaintiff nor either of them are entitled to maintain this suit or action, or to a judgment in this cause.

[fol. 238] XXI. For further plea and answer this defendant says that neither the said plaintiffs nor either of them are entitled to maintain this action or to a judgment in this cause, because of the following facts:

This defendant alleges that the State of Georgia embarked, pursuant to the statutes of Georgia, and particularly those under which the Western & Atlantic Railroad has been constructed and operated, in the construction, maintenance and operation of a railroad, an enterprise usually carried on by individual persons or companies, and in so doing it waived, and has always waived, its sovereign character in respect to the ownership, construction, maintenance and operation of said railroad, and in respect to relations brought about or existing between itself as the owner, constructor, maintainer and operator of said railroad, on the one hand, and the public and third persons, on the other hand, and particularly in respect to this defendant and its predecessors in title in owning, possessing, constructing, maintaining and operating lines of telegraph and the easements necessary therefor upon and along said Western & Atlantic Railroad. In so embarking in the ownership and construction of, and in maintaining and operating, said Western & Atlantic Railroad, whether directly or through any lessee, the said State of Georgia in respect thereto became, and at all times has been, subject to the laws and regulations of Georgia, applicable to, and binding upon, private persons, private corporations and ordinary railroad corporations, owning, constructing, maintaining and operating a railroad; and the



State of Georgia assumed all the obligations and all of the liabilities incident to such ownership and business when carried on by individuals; and this defendant and its predecessors in title acquired as against and from the State of Georgia, under grants and permits and contracts given or entered into by the State of Georgia with this defendant and its predecessors in title hereinafter alleged, and under the conduct and action or non-action of the State of Georgia, and [fol. 239] by adverse use and possession by defendant and its predecessors in title of said lines of telegraph and the easements necessary therefor hereinafter alleged, the same right and title which the Western Union Telegraph Company and its predecessors in title would have acquired and become possessed of under like grants, permits and contracts made by, and under like conduct, action and non-action of private persons, private corporations and ordinary railroad companies, and by like adverse use and possession against private persons, private corporations, and ordinary railroad corporations.

Attached hereto as Exhibit 22 is an abstract of title showing the conveyances and muniments of title under which this defendant and its predecessors in title have acquired, held and claimed title to, and adversely possessed, the telegraph lines described in the petition in this cause, and the land, easements and interest in, through and over the land, taken, used, enjoyed held and possessed by defendant and its predecessors in title for the construction, maintenance and operation thereof, to which leave of reference is prayed with the same force and effect as if herein fully set forth.

Each predecessor in title of defendant from the time of its, his or their initial possession of said telegraph lines, land, easements and interest in land, being the time of the grant, conveyance or muniment of title under which it, he or they acquired and claimed title as set forth herein and in said Exhibit 22, continuously adversely possessed the same until the same were by it, him or them conveyed, and possession thereof delivered, to the next successor in title as set forth in said Exhibit 22 under the written grant, conveyance or muniment of title conveying the same to it, him or them, and also under each grant, conveyance and muniment of title and of its, his or their predecessors in title as set forth in said Exhibit 22. Defendant from the time of its acquisition and possession of said telegraph lines and of the land, easements and interest in, through and over land, upon the conveyance and delivery thereof to it by the American Telegraph Company in the year 1866 as set forth in Exhibit 22, until the present time, has continuously adversely possessed the same. The said adverse possession by defendant and by each of its predecessors in title did not originate in fraud and was public, continuous, exclusive, uninterrupted, peaceable actual and adverse to the State of Georgia and to all persons whomsoever, and was accompanied by a claim and right, and particularly by the claim of right under the written title and color of title conveying the same to each of said possessors as set forth in said Exhibit 22, and also by the claim of right under the written grants, conveyances and muniments of title to each predecessor in title as set forth in Exhibit 22.

The General Assembly of the State of Georgia by an act entitled "An Act limiting the time in which suits in the Courts of law in this State must be brought, and also limiting the time in which indictments are to be found and prosecuted in certain cases, and for other purposes therein mentioned," approved March 6th, 1856, provided and enacted:

"Section I. The General Assembly of the State of Georgia do enact as follows: All suits for the recovery of real estate shall be brought within seven years after adverse possession commences, and not after. But no possession shall be considered adverse unless evidenced by written evidence of title, nor shall any forged or fraudulent title be evidence of adverse possession.

"Section III. All suits for trespasses upon or damages to real estate shall be brought within for years after the right of action accrues and not after.

"Section XI. All suits brought upon bonds or other instruments, under seal, shall be brought within twenty years after the right of action accrues, and not after, but no instrument shall be considered sealed unless so recited in the body of the instrument.

"Section XII. All suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of [fol. 241] law, shall be brought within twenty years after the right of action accrues, and not after.

"Section XXXVIII. That when by the provisions of this act a private person would be barred of his rights, the State shall be barred of her rights under the same circumstances.

"Section XXXIX. And be it further enacted, that this act shall in none of its provisions interfere with the principles established in the Court of Equity in relation to laches or stale demands, or the equitable bars in cases brought to said courts."

Notwithstanding said facts herein alleged and said statute of Georgia, this suit for the recovery of real estate has not been brought within seven years after adverse possession commenced:

This suit for alleged trespasses upon or damages to real estate has not been brought within four years after the claimed right of action accrued;

This suit has not been brought within twenty years after the accrual of any claimed right of action upon any instrument under seal or for the enforcement of any rights accruing under statutes, acts of incorporation, or by operation of law.

XXII. For further plea and answer this defendant says that neither the said plaintiffs nor either of them are entitled to maintain this action or to a judgment in this cause, because of the following facts:

This defendant alleges that the State of Georgia embarked, pursuant to the statutes of Georgia, and particularly those under which the Western & Atlantic Railroad has been constructed and operated,

in the construction, maintenance and operation of a railroad, an enterprise usually carried on by individual persons or companies, and in so doing it waived, and has always waived, its sovereign character in respect to the ownership, construction, maintenance and operation of said railroad, and in respect to relations brought about or existing between itself as the owner, constructor, maintainer and operator of [fol. 242] said railroad, on the one hand, and the public and third persons, on the other hand, and particularly in respect to this defendant and its predecessors in title in owning, possessing, constructing, maintaining and operating lines of telegraph and the easements necessary therefor upon and along said Western & Atlantic Railroad. In so embarking in the ownership and construction of, and in maintaining and operating, said Western & Atlantic Railroad whether directly or through any lessee, the said State of Georgia in respect thereto became, and at all times has been, subject to the laws and regulations of Georgia, applicable to, and binding upon, private persons, private corporations and ordinary railroad corporations, owning, constructing, maintaining and operating a railroad; and the State of Georgia assumed all the obligations and all of the liabilities incident to such ownership and business when carried on by individuals; and this defendant and its predecessors in title acquired as against and from the State of Georgia, under grants and permits and contracts given or entered into by the State of Georgia with this defendant and its predecessors in title hereinafter alleged, and under the conduct and action or non-action of the State of Georgia, and by adverse use and possession by defendant and its predecessors in title of said lines of telegraph and the easements necessary therefor herein-after alleged, the same rights and title which the Western Union Telegraph Company and its predecessors in title would have acquired and become possessed of under like grants, permits and contracts made by, and under like conduct, action and non-action of, private persons, private corporations and ordinary railroad companies, and by like adverse use and possession against private persons, private corporations, and ordinary railroad corporations.

Attached hereto as Exhibit 22 is an abstract of title showing the conveyances and muniments of title under which this defendant and its predecessors in title have acquired, held and claimed title to, and adversely possessed, the telegraph lines described in the petition in [fol. 243] this cause, and the land, easements and interest in, through and over the land, taken, used, enjoyed, held and possessed by defendant and its predecessors in title for the construction, maintenance and operation thereof, to which leave of reference is prayed with the same force and effect as if herein fully set forth.

Each predecessor in title of defendant from the time of its, his or their initial possession of said telegraph lines, land, easements and interest in land, being the time of the grant, conveyance or muniment of title under which it, he or they acquired and claimed title as set forth herein and in said Exhibit 22, continuously adversely possessed the same until the same were by it, him or them conveyed, and possession thereof delivered, to the next successor in title as set

forth in said Exhibit 22 under the written grant, conveyance or muniment of title conveying the same to it, him or them, and also under each grant, conveyance and muniment of title of its, his or their predecessors in title as set forth in said Exhibit 22. Defendant from the time of its acquisition and possession of said telegraph lines and of the land, easements and interest in, through and over land, upon the conveyance and delivery thereof to it by the American Telegraph Company in the year 1866 as set forth Exhibit 22, until the present time, has continuously adversely possessed the same. The said adverse possession by defendant and by each of its predecessors in title did not originate in fraud and was public, continuous, exclusive, uninterrupted, peaceable, actual and adverse to the State of Georgia and to all persons whomsoever, and was accompanied by a claim of right and particularly by the claim of right under the written title and color of title conveying the same to each of said possessors as set forth in said Exhibit 22, and also by the claim of right under the written grants, conveyances and muniments of title to each predecessor in title as set forth in Exhibit 22.

As hereinabove alleged this defendant has had actual continuous adverse possession of said telegraph lines and the land, easements [fol. 244] and interest in land taken, used and enjoyed therefor for more than 20 years prior to the bringing of this suit, and for a much greater length of time when tacked to the preceeding successive possession of its predecessors in title as herein above alleged, and has thereby acquired a good title thereto by prescription against the State of Georgia as the owner of the Western & Atlantic Railroad and the other plaintiff in this cause, and against all persons whomsoever under the statutes of the State of Georgia, and particularly under paragraphs 2637 to 2641 of the first code of Georgia adopted in the year 1860, which have continued in force to the present time.

As hereinabove alleged this defendant has had actual continuous, adverse possession of said telegraph lines and the land, easements and interest in land taken, used and enjoyed therefor, for more than 7 years prior to the bringing of this suit (and at all times subsequent thereto) under written evidence of title, and particularly under the conveyances, contracts and agreement, and judgment in the suit, to which this defendant has been a party as set forth in Exhibit 22 and under the several grants, conveyances and muniments of title to its predecessors in title set forth in Exhibit 22, and defendant has thereby acquired, and its predecessors in title also acquired, a good title thereto by prescription against the State of Georgia as the owner of the Western & Atlantic Railroad and the other plaintiff in this cause, and against all persons whomsoever, under the statutes of the State of Georgia and particularly under paragraphs 2637 to 2642 of the first code of Georgia, adopted in the year 1860 which have continued in force to the present time.

XXIII. For further plea and answer this defendant says that neither said plaintiffs nor either of them are entitled to maintain this action as to the telegraph lines in the State of Tennessee mentioned [fol. 245] in the petition in this cause, or as to the lands,

easements and interest in, through and over the land taken, used, & enjoyed therefor, in the State of Tennessee, because of the following facts:

This defendant alleges that the State of Georgia embarked, pursuant to the statutes of Georgia, and particularly those under which the Western & Atlantic Railroad has been constructed and operated, in the construction, maintenance and operation of a railroad, an enterprise usually carried on by individual persons or companies, and in so doing it waived, and has always waived, its sovereign character in respect to the ownership, construction, maintenance and operation of said railroad, and in respect to relations brought about or existing between itself as the owner, constructor, maintainer and operation of said railroad, on the one-hand, and the public and third persons, on the other hand, and particularly in respect to this defendant and its predecessors in title in owning, possessing, constructing, maintaining and operating lines of telegraph and the easements necessary therefor upon and along said Western & Atlantic Railroad. In so embarking in the ownership and construction of, and in maintaining and operating, said Western & Atlantic Railroad whether directly or through any lessee, the said State of Georgia in respect thereto became, and at all times has been subject to the laws and regulations of Tennessee, applicable to, and binding upon, private persons, private corporations and ordinary railroad corporations, owning, constructing, maintaining and operating a railroad; and the State of Georgia assumed all the obligations and all of the liabilities incident to such ownership and business when carried on by individuals;

The State of Tennessee by an act of its general assembly (acts of 1837 chapter 221 pp. 319, 320), and by an act of its legislature, chapter 195 of the acts of 1847, granted the State of Georgia the [fol. 246] right to construct and operate the Western & Atlantic Railroad from the northern boundary line of Georgia to its terminus at Chattanooga, Tennessee, under terms and conditions subjecting the State of Georgia in the ownership and management of said Western & Atlantic Railroad to the laws of Tennessee applicable to private citizens, and subjecting it to the statutes of Tennessee limiting the right to bring actions and vesting good title in persons having adverse possession for the length of time prescribed in such statutes. The said acts of the General Assembly of Tennessee of the year 1837 and of the year 1847 are set forth in Exhibits 10 and 11 attached to the original answer in this cause and leave of reference thereto is prayed with the same force and effect as if herein set forth.

The State of Tennessee has enacted statutes providing:

(a) That continuous adverse use and possession of land and of any easement therein under a claim of right for a period of twenty years raises the legal presumption of a grant or conveyance, and the person so using and possessing land or easements therein acquires a good title thereto.

(b) That no person, or any one claiming under him, shall have any action either at law or in equity for any lands, tenements, or hereditaments but within seven years after the right of action accrued. Prior to the year 1895 adverse possession for seven years though without any deed gave indefeasible title and barred and defeated the right of action by any claimant. In the year 1895 the General Assembly of the State of Tennessee amended the last mentioned law by providing that to support an affirmative action there must be a recorded deed or grant. So amended said statute has been of force since the year 1895, and a copy thereof is attached as Exhibit 12, to the original answer in this cause, and leave of reference thereto is prayed with the same force and effect as if herein set forth.

Attached hereto as Exhibit 22 is an abstract of title showing the conveyances and muniments of title under which this defendant and [fol. 247] its predecessors in title have acquired, held and claimed title to, and adversely possessed, the telegraph lines described in the petition in this cause, and the land, easements and interest in, through and over the land, taken, used, enjoyed, held and possessed by defendant and its predecessors in title for the construction, maintenance and operation thereof, to which leave of reference is prayed with the same force and effect as if herein fully set forth.

Each predecessor in title of defendant from the time of its, his or their initial possession of said telegraph lines, land, easements and interest in land, being the time of the grant, conveyance or muniment of title under which it, *the* or they acquired and claimed title as set forth herein and in said Exhibit 22, continuously adversely possessed the same until the same were by it, him or them conveyed, and possession thereof delivered, to the next successor in title as set forth in said Exhibit 22 under the written grant, conveyance or muniment of title conveying the same to it, him or them, and also under each grant, conveyance and muniment of title of its, his or their predecessors in title as set forth in said Exhibit 22. Defendant from the time of its acquisition and possession of said telegraph lines and of the land, easements and interest in, through and over land, upon the conveyance and delivery thereof to it by the American Telegraph Company in the year 1866 as set forth Exhibit 22, until the present time, has continuously adversely possessed the same. The said adverse possession by defendant and by each of its predecessors in title did not originate in fraud and was public, continuous, exclusive, uninterrupted peaceable, actual and adverse to the State of Georgia and to all persons whomsoever, and was accompanied by a claim of right and particularly by the claim of right under the written title and color of title conveying the same to each of said possessors as set forth in said Exhibit 22, and also by the claim of right under the written grants, conveyances and muniments of title to each predecessor in title as set forth in Exhibit 22.

[fol. 248] As herein alleged this defendant has had actual continuous adverse possession of said telegraph lines in the State of Tennessee and the land, easements and interest in land in Tennessee,



taken, used and possessed therefor, for more than seven years, by itself, and for a much greater length of time by itself and by those through whom it claims as aforesaid, holding by conveyance, devise, grant or other assurance of title purporting to convey an estate in fee, and particularly those described in said Exhibit 22, and without any claim by action at law or any equity commenced within that time and effectually prosecuted against it; and thereby under the statute of the State of Tennessee, and particularly Paragraph 2763 of the Code of Tennessee this defendant is vested with a good indefeasible title in fee to the said telegraph lines and to said land, easements and interest in land.

This defendant further says that the plaintiffs and those claiming under them have neglected for a term of seven years to avail themselves of the benefit of any title, legal or equitable, by action at law or in equity, effectually prosecuted against defendant in possession under recorded assurance of title, and are now barred of maintaining this suit, or of recovering a judgment therein, because of the statutes of the State of Tennessee embodied in Paragraphs 2764 and 2765 of the Code of Tennessee.

XXIV. For further plea and answer this defendant says that neither the said plaintiffs nor either of them are entitled to maintain this action or to a judgment in this cause, because of the following facts:

The State of Georgia embarked, pursuant to the statutes of Georgia, and particularly those under which the Western & Atlantic Railroad has been constructed and operated, in the construction, maintenance and operation of a railroad, an enterprise usually carried on by individual persons or companies, and in so doing it waived, and has always waived, its sovereign character in respect to the ownership, construction, maintenance and operation of said railroad, and in respect to relations brought about or existing between itself as the owner, constructor, maintainer and operator of said railroad, on the one hand, and the public and third persons, on the other hand, and particularly in respect to this defendant and its predecessors in title in owning, possessing, constructing, maintaining and operating lines of telegraph and the easements necessary therefor upon and along said Western & Atlantic Railroad. In so embarking in the ownership and construction of, and in maintaining and operating, said Western & Atlantic Railroad whether directly or through any lessee, the said State of Georgia in respect thereto became, and at all times has been, subject to the laws and regulations of Georgia, applicable to, and binding upon, private corporations, private persons and ordinary railroad corporations, owning, constructing, maintaining and operating a railroad; and the State of Georgia assumed all the obligations and all of the liabilities incident to such ownership and business when carried on by individuals; and this defendant and its predecessors in title acquired as against and from the State of Georgia, under grants and permits and contracts given or entered into by the State of Georgia with this defendant and its predecessors in title herein-



after alleged, and under the conduct and action or non-action of the State of Georgia, and by adverse use and possession by defendant and its predecessors in title of said lines of telegraph and the easements necessary therefor therein after alleged, the same rights and title which the Western Union Telegraph Company and its predecessors in title would have acquired and become possessed of under like grants, permits and contracts made by, and under like conduct, action and non-action of, private persons, private corporations and ordinary railroad companies, and by like adverse use and possession against private persons, private corporations, and ordinary railroad [fol. 250] corporations. The Supreme Court of the State of Georgia has so adjudicated and decreed in the case of *Western & Atlantic Railroad vs. Carlton* 28 Ga. 180, and in *Schofield vs. Georgia* (as owner of *Western & Atlantic Railroad*) 54 Ga. 635. The Supreme Court of Tennessee has so held in *Western & Atlantic Railroad Company vs. Taylor*, 6 Heisk. 408, and in *Hutchinson vs. Western & Atlantic Railroad Co.*, 6 Heisk. 634.

Attached hereto as Exhibit 22 is an abstract of title showing the conveyances and muniments of title under which this defendant and its predecessors in title have acquired, held and claimed title to, and adversely possessed, the telegraph lines described in the petition in this cause, and the land, easements, and interest in, through and over the land, taken, used, enjoyed, held and possessed by defendant and its predecessors in title for the construction, maintenance and operation thereof. To said Exhibit 22 leave of reference is prayed with the same force and effect as if herein fully set forth.

Each predecessor in title of defendant from the time of its, his or their initial possession of said telegraph lines, land, easements and interest in land, being the time of the grant, conveyance or muniment of title under which it, he or they acquired and claimed title as set forth herein and in said Exhibit 22, continuously adversely possessed the same until the same were by it, him or them conveyed, and possession thereof delivered, to the next successor in title as set forth in said Exhibit 22, under the written grant, conveyance or muniment of title conveying the same to it, him or them, and also under each grant, conveyance and muniment of title of its, his or their predecessors in title as set forth in said Exhibit 22. Defendant from the time of its acquisition and possession of said telegraph lines and of the land, easements and interest in, through and over land, upon the conveyance and delivery thereof to it by the American Telegraph Company in the year 1866 as set forth Exhibit 22, until the present time, has continuously adversely possessed the same. The said adverse possession by defendant and by each of its predecessors [fol. 251] sors in title did not originate in fraud and was public, continuous, exclusive, uninterrupted, peaceable, actual and adverse to the State of Georgia and to all persons whomsoever, and was accompanied by a claim of right, and particularly by the claim of right under the written title and color of title conveying the same to each of said possessors as set forth in said Exhibit 22, and also by the claim of right under the written grants, conveyances and muniments of title to each predecessor in title as set forth in Exhibit 22.

The State of Georgia has given and granted to this defendant and its predecessors in title under and through whom defendant claims full power and authority to construct, reconstruct, maintain, and operate in perpetuity said lines of telegraph mentioned in the petition in this cause and to take use, possess and enjoy in perpetuity the land and the easements and interest in land taken for said lines of telegraph and used, possessed and enjoyed by defendant and its predecessors in title for the construction, reconstruction, maintenance and operation of said lines of telegraph. Said grants and permits by the State of Georgia to the predecessors in title of this defendant are:

- (a) The grant or permit given by an act of the General Assembly of Georgia, approved December 29th, 1847, entitled "An Act to authorize the construction of the magnetic telegraph and providing for the protection of the same."
- (b) The grant or permit given by a contract between the State of Georgia and Garst & Bean of October 11th, 1850 a copy of which is attached as Exhibit 1 to the amendment of defendant's answer filed January 11, 1921, to which leave of reference is prayed with the same force and effect as if herein fully set forth.
- (c) The grant or permit given by an act of the General Assembly of Georgia, approved December 29th, 1847 entitled "An Act to incorporate the Augusta, Atlanta & Nashville Magnetic Telegraph Company." [fol. 252] The permits and grants given directly to this defendant by the State of Georgia are
- (d) The grant or permit by the contract of August 18th, 1870, copy of which is attached to defendant's original answer as Exhibit 7 and to which leave of reference is prayed with the same force and effect as if herein set forth.
- (e) The grant or permit given by an act of the General Assembly of Georgia approved August 26th, 1872, entitled "An act to empower and authorize telegraph companies in this State to construct maintain and operate their lines upon the right of way of the several railroad companies in this State."

The State of Georgia has declared its public policy to be, and that for the public welfare it is necessary, that lines of telegraph should be constructed upon and along railroads and railroad rights of way in the State of Georgia. This declaration has been expressed both by the aforesaid acts approved December 29, 1847, and August 26th, 1872; and also by

"An act entitled 'An Act to empower and authorize telegraph companies in this State to construct, maintain and operate their lines upon the right of way of the several railroad companies of this State,' approved January 28th, 1873; and also by

An act entitled "An act to encourage and authorize the construction of telegraph lines in the State of Georgia, and conferring certain privileges and powers on the owners and for other purposes," approved September 12th, 1889; and also by

An act entitled "An act to encourage and authorize the construction of telegraph lines in the State of Georgia and conferring certain privileges, powers and penalties on the owners thereof and to provide a penalty for divulging the contents of any private message by any person connected with such telegraph company," approved November 12th, 1889.

After the execution and delivery of the aforesaid contract of Aug. [fol. 253] 18th, 1870, copy of which is attached to defendant's original answer as Exhibit 7 as aforesaid, the Western & Atlantic Railroad Company, the then lessee of the Western & Atlantic Railroad from the State of Georgia, claimed that the State of Georgia was the owner of one wire in defendant's line of telegraph mentioned in the petition in this cause, and that it as said lessee was entitled to the possession and use thereof, declared that it had never accepted or become a party to the said contract of August 18th, 1870, was not bound by its provisions and refused to comply therewith. Thereupon defendant brought suit against said Western & Atlantic Railroad Company in the United States District Court for the Northern District of Georgia in the year 1872 to recover money which it claimed was due it by said Western & Atlantic Railroad Company, and for the use of said wire and for services which it had rendered in accordance with the provisions of said contract of August 18th, 1870, to restrain the Western & Atlantic Railroad Company from interfering with said wire, from putting it to a use not authorized by said contract of August 18th, 1870, and from withholding from the Western Union Telegraph Company the said wire claimed by the Western & Atlantic Railroad Company as said lessee, and for other equitable relief.

To the petition filed in said suit the Western & Atlantic Railroad Company filed its answer; denied that it had participated in the execution of said contract of August 18th, 1870; denied that it had accepted, or in any manner become bound by, that contract; claimed that one of the wires in the lines of the Western Union Telegraph Company along the Western & Atlantic Railroad and certain instruments, batteries and fixtures had been purchased by, and belonged to, the State of Georgia, and that the State of Georgia had delivered possession thereof to the Western & Atlantic Railroad Company as lessee aforesaid; and that, as said lessee, the Western & Atlantic Railroad Company was entitled to the exclusive possession and use [fol. 254] of said wire instruments, batteries and fixtures, it was not liable to the Western Union Telegraph Company for any charges for the use and enjoyment thereof.

A judgment was rendered in the United States Circuit Court for the Northern District of Georgia sustaining the claim of the Western & Atlantic Railroad Company and dismissing the bill filed by the Western Union Telegraph Company. The Western Union Tele-

graph Company entered an appeal to the Supreme Court of the United States, which, in a decision in said case reported in 91 U. S. 283, adjudged that said wire, instruments, batteries and fixtures, claimed as aforesaid by the Western & Atlantic Railroad Company, had not been purchased by, and did not belong to, the State of Georgia, but was the property of the Western Union Telegraph Company, for the use of which by the Western & Atlantic Railroad Company the Western Union Telegraph Company was entitled to compensation. The Supreme Court of the United States therefore reversed the decree of the Circuit Court with direction that the case be referred to a master to state an account on the terms of the contract of August 18th, 1870, as between the Western Union Telegraph Company and the Western & Atlantic Railroad Company for the term that the latter had used the wires, batteries and equipments, and to render a decree for that amount. A mandate was thereupon issued and transmitted to, and made the judgment of, the United States Circuit Court. Thereafter the Western Union Telegraph Company and the Western & Atlantic Railroad Company adjusted the differences between themselves and settled said suit and controversy therein, as is set forth in a receipt for the sum of Four Thousand Dollars (\$4,000.00) executed and delivered by the Western Union Telegraph Company and the Western & Atlantic Railroad Company, dated September 11th, 1876, and a resolution of the Executive Committee of the Western & Atlantic Railroad at a meeting held September 11th, 1876. Copies of said receipt and of said resolution are attached as exhibits 8 and 9 respectively to defendant's original answer, and leave of reference thereto is prayed with [fol. 255] the same force and effect as if herein set forth.

By a resolution approved October 22nd, 1887, (Georgia laws 1887, page 911), the General Assembly of Georgia requested the Governor of the State to instruct the Attorney General to examine into the facts and circumstances of the said contract of August 18th, 1870; and further thereby instructed the Attorney General, in the event it should appear that good grounds existed to authorize the rescinding of said contract, to institute proceedings to that end. Notwithstanding said resolution no action has ever been instituted by any attorney general of Georgia, nor has any proceeding or action been instituted by or on behalf of the State of Georgia, to rescind said contract or involving the same until the institution of this suit. Defendant alleges that no good ground did in fact exist for rescinding said contract or for instituting any action or proceedings conditionally authorized by said resolution. In any event the State is now barred by its laches and by the statutes of limitation from questioning the validity of said contract or from instituting the present suit or any proceeding whatever whereby or wherein the validity of that contract may be involved or questioned.

The General Assembly of the State of Georgia by joint resolutions approved December 19th, 1893 (Georgia Laws 1893, page 501), and approved December 18th, 1894 (Georgia Laws 1894, page 283), further recognized and provided that adverse possession of land,

rights, ways and properties of the Western & Atlantic Railroad would ripen into, and would constitute good title thereto, and that such possession, and also laches and delay on the part of the State of Georgia, would bar the State of Georgia from any claim in, and the prosecution of any suit for, land, rights, ways and properties so adversely held and used by any person, including the Western Union Telegraph Company, and as to which the State had been guilty of [fol. 256] laches and delay, whenever under like circumstances and adverse possession and laches and delay good title would be acquired against a private person, and whenever under like circumstances and adverse possession, laches and delay a private person would be barred from claiming land, rights, ways and properties, or from suing therefor. Said resolutions further provide that "a settlement of each and every case of encroachment, adverse claim, occupation or right held against the interest of the State" shall be effected "in such a manner and on such terms as will be fair and equitable," and that any judgment or decree rendered in "finally determining any and all matters of controversy and issues, both of law and fact between the State of Georgia and any person or persons affecting or relating to the Western & Atlantic Railroad, its rights, way and properties," "shall be so moulded in each case as to establish and give effect to all the rights and equities of the parties in the subject matter."

The constitution of the United States (Art. 1, Section 8) empowers Congress

"(3) To regulate commerce with foreign nations and among the several states and with the Indian tribes.

"(7) To establish post-offices and post roads.

"(10) To declare war.

"(11) To raise and support armies. \* \* \*

"(12) To provide and maintain a navy.

"(14) To provide for calling forth the militia to execute the laws of the Union, to suppress *resurrections*, and repel invasions.

"(15) To provide for organizing, arming and disciplining the militia. \* \* \*

[fol. 257] "(17) To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States and in any department or officer thereof."

Pursuant to the power given it, the Congress of the United States on July 7th, 1838, enacted that each and every railroad within the limits of the United States, then or thereafter completed, should be a post route and post road, and by subsequent acts, and particularly the act of March 3rd, 1853, and the act of June 8th, 1872, enacted that all railroads or parts of railroads then or thereafter in operation were established post roads.

In the exercise of the large discretion as to the means to be employed by it in the exercise of these powers to accomplish the objects and results for the accomplishment of which these powers were bestowed upon it, to facilitate interstate commerce, to aid in the construction of telegraph lines (and instrument of such commerce) and to secure to the Government of the United States the use of telegraph lines for postal military and other purposes, the Congress of the United States on the 24th day of July, 1866, passed an act entitled "An Act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes, "which, with the amendments thereto, are now embodied in the Revised Statutes of the United States, Chapter 65, Paragraphs 5263-5269; and therein and thereby Congress enacted that any telegraph company then, or thereafter, organized under the laws of any State of the United States should have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which had been, or might thereafter be, declared such by an act of Congress, and over, under or across the navigable streams or waters of [fol. 258] the United States and bestows other rights and privileges; provided that before any telegraph company should exercise any of the powers or privileges conferred by said act, such company should file its written acceptance with the Postmaster General of the restrictions and obligations required by said act.

Said statute of the United States imposed upon any telegraph company accepting its provisions contractual and statutory obligations, including the obligation to transmit telegrams between the several departments of the Government and other officers and agents over its lines of telegraph with priority over all other business and at such rates as the Postmaster General shall annually fix; and with the further obligation to sell all of its lines of telegraph to the United States whenever the United States might desire to purchase the same. For failure to fulfill the duties and obligations imposed by such accepted statute, the said statute imposes severe pains and penalties.

On or about the 8th day of June, 1867, defendant filed its written acceptance with the Postmaster General of the United States of the restrictions and obligations of said act, a copy of which acceptance is attached to defendant's original answer as Exhibit 13, and to it leave of reference is prayed with the same force and effect as if herein set forth.

This defendant does not claim that the said statute of the United States, often referred to as the Post Roads Act, in and of itself authorized this defendant against the will of the State of Georgia owning the Western & Atlantic Railroad right of way, or without adequate compensation paid or tendered under due process of law, to enter upon the Western & Atlantic Railroad right of way or properties, or to construct maintain and operate thereon telegraph lines, and to use, enjoy and possess easements in said Western & Atlantic Railroad right of way necessary for said lines of telegraph; but this de-



defendant does claim and assert that the State of Georgia, in giving and granting to its predecessors in title perpetual and assignable easements (acquired as hereinabove alleged by this defendant), and in giving and granting to this defendant perpetual easements in and by the aforesaid contract with the State of Georgia of August 18th, 1870, and by its conduct and statutes permitting this defendant by its adverse use and occupation, and through the laches, action and non-action of the State of Georgia, to acquire perpetual easements for said line of telegraph upon said right of way of the Western & Atlantic Railroad, assented to, and made it lawful and permissible for the Western Union Telegraph Company to make with the United States the contract entered into as above stated by defendant's acceptance of the said statute of the United States. Having permitted and assented to that contract, the State of Georgia permitted the Western Union Telegraph Company to contract with the United States, for and to obtain from it, the benefits, properties, rights of way and privileges by that act granted, and assented to and made it lawful for the Western Union Telegraph Company to assume, and to bind itself for the fulfillment of, the obligations imposed and created by said accepted act of Congress.

This defendant having, as herein alleged, obtained full right and title to the perpetual easements occupied, used and possessed by it for its said lines of telegraph upon and along said Western & Atlantic Railroad; and having obtained from or under the State of Georgia, as herein alleged, full right and title to said easements, and the right to enter into the contract with the United States created by the acceptance of said act of Congress; and having acquired the right and permit granted by Congress to maintain and operate its lines of telegraph upon and along that post road known as the Western & Atlantic Railroad; this defendant claims a full and complete title to said easements in perpetuity has been acquired by it, and that a part or increment of said title is the grant and permit to defendant under and by said accepted act of Congress.

[fol. 260] The predecessors in title of this defendant, and this defendant itself under the conditions and circumstances hereinabove set forth and under the grants and permits and encouragement of the State of Georgia, and pursuant to the declared policy of Georgia, has constructed, reconstructed and maintained said lines of telegraph during the period of time hereinabove mentioned, and has during all of that time possessed, used and enjoyed the land, easements and interest in land taken for, and necessary for the construction, maintenance and operation of, said lines of telegraph, and it will now be unjust and inequitable to defendant to permit the plaintiffs, or either of them, to maintain this suit or to recover a judgment thereunder; and the maintenance of this suit and any recovery therein by the plaintiffs or either of them will be unjust and inequitable to defendant not only because of the facts hereinabove alleged, but also under and because of the following facts.

The cost or value of the telegraph poles, cross arms and fixtures belonging to defendant as they now stand in place upon or along the said right of way is large and amounts to many thousands of dollars.



Should said telegraph poles with their supports, cross arms, wires and fixtures be removed from the said Western & Atlantic Railroad and its right of way there would unavoidably be great breakage and damage; much would not be available for the construction of another line or lines elsewhere to take the place of those removed or destroyed, and the cost of establishing another line elsewhere, & transporting poles, wires and instruments to a new line, would be exceedingly great. Besides this, the destruction of this link or part of defendant's system would affect the value of the system itself and would deprive defendant of the good will and business which it has, during the long course of its possession and operation of said lines of telegraph mentioned in the petition, built up and established.

Defendant at the times hereinabove mentioned did at great cost [fol. 261] and expense to itself erect, construct, reconstruct, equip and maintain the said telegraph lines mentioned in the petition in this cause, which said lines were intended to become, and did become, and now are, a component, important, permanent link or part of the extensive and constantly growing telegraph system of defendant, all of which was, during all of the time of the erection, construction, reconstruction, maintenance and operation and possession aforesaid of said lines of telegraph, properties and easements, well known to the State of Georgia, to the several lessees of the Western & Atlantic Railroad, and to all persons owning or having any interest in the land and property on, upon and over or through which said telegraph lines were so constructed, maintained and operated. Neither the State of Georgia nor any lessee from the State of Georgia, nor any persons having or claiming any right, title or interest in or to the land and properties on, upon, along, through or over which said telegraph lines have been so constructed, maintained and operated, have at any time ever objected to the erection, construction, reconstruction, equipment, maintenance and operation of said telegraph lines by defendant except the objection made by the first lessee whose claim was denied by the Supreme Court of the United States as hereinabove alleged.

Defendant, prior to its acquisition of said lines of telegraph mentioned in the petition in this cause, and at all times subsequent thereto, has possessed, maintained and operated a very large and extensive system of telegraph, constructed at great cost and expense to it, which it has constantly enlarged and developed, extending its lines to new and more distant points, and at the time of the filing of this suit defendant's system of telegraph had become very vast and reached all points in the world of any importance. The lines of telegraph mentioned in the petition in this cause were, and are, of great and increasing importance, and were and are an important link in defendant's system.

[fol. 262] Defendant's system of telegraph operated directly by it now and upon the filing of this suit consists of more than one hundred and ninety-two thousand (192,000) miles of poles and cables and over nine hundred thousand (900,000) miles of wires, covering practically the entire territory of the United States, reaching every city of any importance, and almost every station on the

various lines of railroads, except flag or non-important stations. During the times hereinabove mentioned, the services rendered by defendant to the public and to the Government of the United States *has* constantly increased, and the said telegraph lines mentioned in the petition in this cause have continuously increased in importance as a link in defendant's system, and the service rendered over said lines both to the public and to the Government has constantly and continuously increased.

The said lines of telegraph mentioned in the petition in this cause is a link in that portion of defendant's system which constitutes the most direct and shortest route between Atlanta and points south and east thereof, and Chattanooga and points north and west thereof, and is one of the main channels for the transmission of messages between the great centers of trade in the United States.

The volume of business passing over defendant's telegraph lines mentioned in the petition in this cause is enormous, messages are sent continuously and with practically no cessation, and the number of messages are very great. A great number of messages originate or terminate at points on or along said Western & Atlantic Railroad. A vast number of telegrams are continuously transmitted over said lines which neither originate at or are forwarded from, nor terminate or are deliverable at, points on said railroad, of which telegrams a great number annually are transmitted for the Government of the United States, its officials and departments.

Two circuits of one wire each on said lines are leased to the Associated Press, one circuit being in continuous service twenty-four (24) hours of each day, and the other being in continuous service five (5) hours each day, besides which a great many messages are transmitted for the Press known as Associated Press Poney Reports.

Reports transmitted over defendant's lines mentioned in the petition in this cause for the Government of the United States, its officials and departments, include reports from weather observatories concerning weather conditions upon which weather maps and forecasts are made, and weather reports or messages giving the result of the compilation of the reports last above named. These weather reports are of great value to the public at large and of special importance to those engaged in agricultural pursuits, navigation, &c.

The laws of the United States and of Georgia, hereinabove mentioned, impose upon the Western Union Telegraph Company, under pains and penalties therein provided, the duty and obligation of receiving, transmitting and delivering for the United States, for Georgia and for the public, messages over its lines of telegraph, including said lines of telegraph mentioned in the petition in this cause. Said statutes make it unlawful for any person whomsoever to destroy or damage said lines of telegraph or to prevent the maintenance and operation thereof, or to do any act which will interfere therewith, or which will defeat the ability of the Western Union Telegraph Company to perform its said duties and obligations.

Under the facts herein alleged and the lapse of time and laches of complainants it will be inequitable to allow the plaintiffs to en-

force their claimed rights, if any they ever had, and this court of equity to which the complainants have appealed should interpose an equitable bar to the claims of the said plaintiffs, and should not render a judgment in complainants' favor but in favor of this defendant, and this defense is expressly made available against the [fol. 264] State of Georgia by its General Assembly by an act entitled "An Act limiting the time in which suits in the courts of law in this State must be brought, and also limiting the time in which indictments are to be found and prosecuted in certain cases, and for other purposes therein mentioned," approved March 6th, 1856 and paragraphs 4369 and 4371 of the present code of Georgia.

XXV. For further plea and answer this defendant says that neither the said plaintiffs, nor either of them, are entitled to maintain this action or to a judgment in this cause, or to the relief prayed for, because of the following facts:

If the act of the General Assembly of Georgia, approved November 30th, 1915, mentioned in the 8th paragraph of the petition in this suit, or any amendment thereto, has the force and effect, and delegates the authority, claimed by complainants in this suit, then said statute is opposed to, and violates the constitutions of the United States and of Georgia; and in any event the said act, and the resolutions of the railroad commission of Georgia, copy of which is attached to defendant's original answer as Exhibit 14 to which leave of reference is prayed with the same force and effect as if herein set forth, and this suit and any judgment or decree of any court giving to said statute the force and effect claimed in this suit by the plaintiffs therein, and any judgment or decree of any court upholding giving effect to, or enforcing, said resolution of said commissioners, and any judgment or decree of any court granting the prayers of the petition in this case, will be violative of the Constitutions of Georgia and of the United States in that thereby

(a) There will be, by a statute or law passed or made subsequently, an impairment of the obligations of the following contracts and each of them, to-wit:

(1) The act of the General Assembly of the State of Georgia approved December 29th, 1847, entitled "An act to authorize the construction of the magnetic telegraph and providing for the protection of the same." That act gave to any person or corporation the right [fol. 265] to construct, maintain and operate telegraph lines, posts and fixtures upon or along any public road or highway in the State of Georgia without limitations, and imposed the obligation on the State of Georgia not to interfere with such telegraph lines or with easements thereby granted to, nor to take the same from, any person or corporation constructing telegraph lines after the passage upon or along any public road or highway in Georgia, or from it or their successors in title. Said telegraph lines mentioned in the petition were constructed thereafter upon or along the public road or highway known as the Western & Atlantic Railroad by a predecessor in title of defendant, and were maintained and operated by the predecessors

in title of defendant mentioned in Exhibit 22 hereto attached, and said predecessors in title thereby became vested with the rights, grants and privileges given by, and became entitled to the performance of the obligations of the State of Georgia under, said act, to all of which this defendant has become, and now is, entitled by assignments and conveyances set forth in Exhibit 22 hereto attached and to which leave of reference is prayed with the same force and effect as if herein set forth.

(2) The contract between the State of Georgia and Garst & Bean of October 11th, 1850 set forth in Exhibit 1 attached to the amendment filed January 1921 to defendant's original answer. Said contract gave to Garst & Bean and their successors and assigns the right to construct the telegraph lines mentioned in the petition and maintain and operate the same without limit upon or along the right of way of the Western & Atlantic Railroad, and obligated the State of Georgia not to interfere with said telegraph lines and said easements therefor so granted, nor to take the same from Garst & Bean or their successors in title. Said telegraph lines mentioned in the petition in this cause were constructed and maintained under the permits and grants in said contract, contained and were maintained and operated by Garst & Bean and their successors in title mentioned in Exhibit 22 hereto attached, and were successively assigned by the [fol. 263] conveyances, agreements and muniments of title, and to the persons and corporations, mentioned in Exhibit 22, and each of said successors in title became vested with the rights, grants and privileges given by, and became entitled to the performance of the obligations of the State of Georgia under, said contract, to all of which this defendant has become, and now is, entitled by the assignments and conveyances set forth in Exhibit 22 hereto attached, to which leave of reference is prayed with the same force and effect as if herein set forth.

(3) The act of the General Assembly of the State of Georgia entitled "An act to incorporate the Augusta, Atlanta & Nashville Magnetic Telegraph Company" approved January 27, 1852. That act ratified and confirmed the above mentioned contract between the State of Georgia and Garst & Bean, and in addition thereto granted the Augusta, Atlanta & Nashville Magnetic Telegraph Company power and authority without limit to construct and maintain its telegraph lines and fixtures upon and along the Western & Atlantic Railroad, and imposed the obligation on the State of Georgia not to interfere with such telegraph lines or with easements granted by the said act, or to take the same from, said Augusta, Atlanta & Nashville Magnetic Company, its successors or assigns. Said telegraph lines mentioned in the petition were constructed, maintained and operated upon or along the Western & Atlantic Railroad by the Augusta, Atlanta & Nashville Magnetic Telegraph Company, and were maintained and operated by its successors in title mentioned in Exhibit 22 hereto attached, and said successors in title thereby became vested with the rights, grants and privileges given by, and became entitled to the performance of the obligations of the State of Georgia under

said act, to all of which this defendant has become and now is entitled by assignments and conveyances set forth in Exhibit 22 hereto attached, to which leave of reference is prayed with the same force and effect as if herein set forth.

[fol. 267] (4) The contract dated August 18th, 1870, between the State of Georgia and the Western Union Telegraph Company authorized by the acts of the General Assembly of Georgia under which the Western & Atlantic Railroad has been constructed and operated, a copy of which contract is attached to the original answer of defendant as Exhibit 7, and to which leave of reference is prayed with the same force and effect as if herein set forth. By said contract the State of Georgia gave and granted to defendant the right in perpetuity to maintain and operate its lines of telegraph in the petition described upon and along the Western & Atlantic Railroad, and gave and granted defendant perpetual easement therefor, and the State of Georgia thereby obligated itself not to interfere with such telegraph lines or with said easements.

(5) The several conveyances and muniments of title mentioned in Exhibit 22 hereto attached additional to those above specified to which the State of Georgia was a party. Under said muniments of title this defendant acquired the telegraph lines mentioned in the petition and particularly easements therefor.

The impairment of the obligations of the aforesaid contracts, and of each of them violates

The Constitution of Georgia of 1977 and Art. 1 Sec. 3 Par. 2 thereof.

The United States Constitution Art. 1 Sec. — Par. 1.

The Georgia Constitution of 1861, Art. 1, Par. 18 in respect to the statutes, grants and contracts above mentioned antedating the year 1861.

(b) The State of Georgia will have made and enforced a law revoking grants of privileges or immunities granted, as above stated, to defendant and its predecessors in title by the statutes and contracts of the State of Georgia hereinabove mentioned in such manner as to work injustice to defendant, which violates

Georgia Constitution of 1877 Art. 1, Sec. 3 Par. 3.

[fol. 268] (c) The rights, privileges and immunities which as herein above alleged have vested in; or accrued to defendant's predecessors in title and to defendant under and by virtue of the acts of the General Assembly of Georgia hereinabove specified will not be held inviolate by all courts before whom they may be brought in question which violates

Georgia Constitution of 1877 Art. 12, Sec. 1, Par. 5.

Georgia Constitution of 1868 Art. 11 Par. 5.

Georgia Constitution of 1865 Art. 5, Par. 8.

(d) Rights, privileges and immunities which have vested in or accrued to this defendant under and in virtue of the judgment, decree or order in the United States Circuit Court for the Northern

District of Georgia and the Supreme Court of the United States described in Exhibit 22, to which leave of reference is prayed with the same force and effect as if herein set forth, adjudicating and vesting in defendant title to said telegraph lines mention in the petition and perpetual easements therefor, and the right to maintain and operate the same as the owner thereof, which violates the provisions of the Georgia Constitutions in paragraph c herein above mentioned.

(c) The property of defendant, being the telegraph lines mentioned in said petition, the perpetual easements necessary therefor, and the property right to operate and manage the same and to perform its obligations to the United States under the provisions of title 65 of the Revised Statutes of the United States accepted by this defendant as set forth in Exhibit 13 attached to defendant's original answer, to which leave of reference is prayed with the same force and effect as if herein set forth, will be taken without due process of law and without compensation first paid defendant which violates

Georgia Constitution of 1877	Art. 1, Sec. 1, Par. 3.
"	" of 1877 Art. 1, Sec. 3, Par. 1.
"	" of 1868 Art. 1, Par. 3.
"	" of 1865 Art. 1, Par. 2.
"	" of 1861 Art. 1, Par. 4.

United States Constitution 14th Amendt.

[fol. 269] W. L. Clay, Brewster, Hornell & Heyman, Def't's Atty's.

[fol. 270] EXHIBIT 20 TO AMENDED ANSWER

New York, May 10th, 1865.

Col. E. S. Sanford, Prest. American Telegraph Co.

DEAR SIR: In obedience to your request the undersigned beg leave to submit the following brief history of their operations during the past four years.

In the month of April, 1861 when all postal and telegraphic communication between the Northern and Southern States was abruptly terminated by the Federal authorities we being stockholders in the American Telegraph Company were convinced that some steps must be promptly taken to secure the control of the property belonging to the Company in the Southern States, we therefore took the responsibility at once and assumed the authority justified as we believed by the emergency, agreed to act as President and Treasurer and appointed Mr. J. R. Dowell, (the Superintendent of the Division between Washington and New Orleans) General Superintendent with the intention of submitting our action to a meeting of the stockholders of the American Telegraph Company residing in the (then so-called) Confederate States. At the time we issued an order by telegraph to the Managers of all the offices in the Southern States directing them to cease depositing their receipts to the credit of Francis Morris Treasurer American Telegraph Company and to

make the

This w  
munication  
the funds  
he could n  
moned eve  
resided in t  
[fol. 271]  
the stock h  
not only ra  
to fill the o  
\$3,000, an  
firmed. T  
Crenshaw  
with the Pr  
trol of all

At this r  
organization  
Company,  
holders and  
rights of a  
resolved th  
the benefi  
the Americ  
"Southern  
known to t  
this headin

A few d  
ington and  
ern States

This mee  
our control  
The resolu  
presented  
meeting a  
unanimous  
in the W.  
or six shar  
[fol. 272]  
other meet  
this meetin  
other Comm  
Tel. Comp  
adjudicati  
mittee met  
after lengt  
policy of o  
ly legal ge  
cided that  
stances and  
as it was, r

the same in future in the name of Thos. H. Wynne, Treas. was a necessary consequence upon the others as all communication between the two sections of the country being cut off, if funds had been deposited as hitherto to the credit of Mr. Morris, could not have drawn for nor we have used them. Having summoned every stockholder of the American Telegraph Company who resided in the Southern States in the month of May following a meeting was held in Richmond. This meeting represented all stock held in the so-called Confederate States and our action was unanimously ratified but fully approved of and endorsed. We were elected the officers we had assumed, the salary of the President fixed at \$1,500, and that of the Treasr. at \$1,500, and all our actions confirmed. Two gentlemen, the largest stockholders, Messrs. Robert W. Law of Lynchburg and Charles Scott were appointed to act as the President as an Executive Committee to have the entire control of all matters relating to the interest of the Company. At this meeting resolutions were adopted pledging ourselves as an association to assume all the obligations of the American Telegraph Company, to the leased lines paying the rents to all of the stockholders and so far as possible in every way to protect the property and interests of all the parties interested in our management. It was also decided that inasmuch as we ought in our official capacity to act for the benefit of all the Companies in the South connected by lease with the American Telegraph Company, we should take the title of the "Southern Telegraph Companies" and by this title we have been known to the public and all of our printed and official papers have borne the name.

A few days after this a meeting of the stockholders of the Washington and New Orleans Telegraph Company residing in the Southern States were held in Augusta, Georgia. A meeting was called for the purpose of taking the lines out of the control of the stockholders of the American Telegraph Company. The meeting was composed of a minority of the stock held in the South. The resolution adopted by the meeting held in Richmond were presented to them and our actions individually and those of the meeting above named together with the election of the officers almost unanimously approved. There were however among the stockholders of the W. and N. O. Company two gentlemen who together held five shares of the stock who were still anxious to get the control of the lines and for this purpose they called and held another meeting of the stockholders in Augusta 1861. The result of the meeting was the appointment of a Committee to confer with another Committee to be appointed by the stockholders of the American Telegraph Company residing in the Southern States for the purpose of settling all questions between the Companies. This joint Committee met in Richmond in the month of September following and after lengthy consultation in which the legality and propriety and the merits of our actions and the positions we had assumed were discussed with all gentlemen until every point was fully canvassed it was decided that we had done the best that was possible under the circumstances and they reported in favor of allowing every thing to remain as it was, recommending however, that inasmuch as the title under



which we have been acting, viz: "Southern Telegraph Companies" was not a legal one and by it we could neither sue or be sued we should obtain a charter for a new Company, which Company in consideration of the fact that it was expected it would be composed of the Stockholders in and consequently an union of the interests of the American the Washington and New Orleans, Lynchburg and Abingdon, East Tennessee and the Richmond Charlottesville and Staunton Telegraph Companies, all of which were leased by the American Telegraph Company, the proposed new Company should be called the "Confederate Telegraph Company," acting upon the suggestion we obtained from one of the Courts of Virginia under the operations of an act passed several years before the secession of the States, a charter for a Company under this title and proceeded at once to organize the same. The officers acting for the "Southern Telegraph Companies" were elected to similar positions, and we have ever since continued to perform all the duties and carry out all the obligations assumed by us at the first meeting held in May, 1861. (The officers of the Confederated Telegraph Company have never received any salaries from that Company). The rents of all the lines leased by the American Telegraph Company have been paid to every stockholder in the Southern States whom it was possible to reach by [fol. 273] mail or Express, but from the first there were a few to whom we could not have access, and in consequence of military movements this number has been continually increasing. After paying the rents and a quarterly dividend of three per cent to the Stockholders of the American Telegraph Company (this being the amount received by us prior to the separation) we have divided the surplus among the last named with the understanding that it was to be invested in the stock of the "Confederated" Company. This has been done. A few who could not afford it, did not subscribe to the full amount of these dividends but others have taken more than their proportion and thus upon the whole the amount paid in, is greater than that divided. At the same time to avoid any trouble in future settlements with the American Telegraph Company, the Treasurer (Who had given bonds to the amount of \$50,000 for the faithful performance of his duties) took from every stockholder receiving the extra dividend, an indemnifying bond for the amount paid to protect him from any action which might be brought against him.

It is proper to add that none of the stockholders in the leased lines took any stock in the Confederated Company and with the exception of probably fifty shares taken by the officers of the "Southern Telegraph Companies" it is owned exclusively by the stockholders of the American Telegraph Company.

The results of the operations of the Confederated Company has been to erect the following named lines. One wire from Fredericksburg to Richmond along the R. F. and P. R. R. sixty miles. One wire from Richmond to Greensboro, N. C. along the Richmond and Dansville and the Piedmont R. Rd. two hundred miles. One wire from Columbia to Aiken S. C. along the county road fifty miles. One wire from Atlanta via Opelike, one hundred and seventy five miles. One wire from Selma to Meridian one hundred miles. One

wire from Selma to Blue Mountain one hundred and fifty miles. One wire from Kingston to Rome twenty miles and one wire from Florence to Charleston, one hundred and three miles being a total of eight hundred and sixty three miles of lines occupied by one wire. In addition to which we have distributed and erected a large [fol. 274] proportion of the poles between Petersburg and Florence about three hundred and twenty miles and the same report may be made of the line between Augusta and Atlanta one hundred and seventy miles.

We have also secured for this Company rights of way over other routes with privileges which otherwise would have been lost to us and all of which was secured with the view ultimately, let the war result as it would, to the interests of all the Companies, never losing sight of the fact that our interests were identical, and that we would at some future time turn over to them their legitimate property with an account of the trust which though forced upon us by circumstances over which we had no control was yet willingly accepted and managed to the best of our ability, relying upon their sense of propriety and justice to make such terms in the settlement of the transfer as would be satisfactory to the gentlemen who have sustained us in the efforts which we have made to promote the interests of the American Telegraph Company while dealing justly with all the parties interested in our management and who have also invested their money in the Confederate Company.

At the risk of appearing egotistical we will venture to add that the difficulties which have surrounded us and embarrassed our operations, especially during the past three years can scarcely be imagined by those who have not lived as we have in the midst of the war which has devastated the South and rendered the greater portion of the State in which we lived and acted "a vast howling wilderness."

The difficulty of getting supplies, the frequent raid by which important lines were torn down and materials destroyed, and which had to be repaired as soon as possible, many of them eight or ten times during the past two years. The interference of the Conscript Bureau with the persons in our employment, the seizure of lines by military authorities, opening offices and putting incompetent and unworthy men upon the lines, the want of transportation, the scarcity of labor and everything that was necessary to keep us in existence. [fol. 275] All of these from which you have been happily exempt have kept both our heads and hands busy. But all of these difficulties have been cheerfully struggled with amidst the odium of continued reproaches for disloyalty to the so called Confederate Government because we would not surrender the property of and prove disloyal to our associates in any of the Companies; and continued to work on waiting and hoping for the period to arrive when we could once more renew our intercourse with those with and for whom we were working.

In conclusion we would respectfully recommend that the American Telegraph Company proceed without delay to put the lines in the Southern States in operation as soon as possible to prevent preda-

tions on the wire and poles for the important purpose of affording the facilities of communication.

We regret to have to add that many of the papers which would sustain us in the statements we have made, were lost in the fire which destroyed our office with the greater portion of the City of Richmond, but all that we have stated can be sustained by the most satisfactory proof if necessary.

All of which is respectfully submitted by

Your obedient Servants (Signed) Wm. S. Morris, Prest.  
Confederated Telegraph Company. (Signed) Thos. H.  
Wynne, Treas. Confederated Tel. Company.

[fol. 276]

EXHIBIT 21 TO AMENDED ANSWER

In consideration of One Dollar, and other valuable considerations, the Confederated Telegraph Company, release quit claim and assign to the American Telegraph Company (chartered by the State of New Jersey), all the Telegraph lines and property put up or held by said Confederated Telegraph Company, within the States of Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi and Louisiana.

Witness the seal of said Confederated Telegraph Company, and the hand of its President this 20th day of June A. D. 1865.

Wm. S. Morris, Prest. Confederated Telegraph Co.

The Company have never adopted a seal. Thos. H. Wynne, Treas. & Secty. C. T. Co. (L. S.)

[fol. 277]

EXHIBIT 22 TO AMENDED ANSWER

Abstract of Title Relied upon by Defendant

1. The grant or permit given by an act of the General Assembly of Georgia, approved December 29th, 1847 entitled "An act to authorize the construction of the magnetic telegraph and providing for the protection of the same."

2. The grant or permit given by a contract between the State of Georgia and Garst & Bean of October 11th, 1850, a copy of which is attached as Exhibit 1 to the amendment of defendant's answer filed January 11th, 1921, to which leave of reference is prayed with the same force and effect as if herein fully set forth.

3. The grant or permit given by an act of the General Assembly of Georgia, approved January 27th, 1852 entitled "An act to incorporate the Augusta, Atlanta & Nashville Magnetic Telegraph Company."

4. A mortgage from Augusta, Atlanta & Nashville Magnetic Telegraph Company to William Pylus and Samuel M. Scott, a copy of which is attached to the amendment filed Jan. — 1921 to defendant's original answer as Exhibit 15, and leave of reference thereto is prayed with the same force and effect as if herein set forth.
5. A mortgage from Augusta, Atlanta & Nashville Magnetic Telegraph Company to J. Washburn & Company, a copy of which is attached to the amendment filed Jan. — 1921 to defendant's original answer as Exhibit 16, and leave of reference thereto is prayed with the same force and effect as if herein set forth.
6. A mortgage from Augusta, Atlanta & Nashville Magnetic Telegraph Company to Samuel Clark, copy of which as Exhibit 17 is attached to the amendment filed Jan. — 1921 to defendant's original answer, and leave of reference thereto is prayed with the same force and effect as if herein set forth.
7. A judgment in a suit brought by Campt & Hammett against Augusta, Atlanta & Nashville Magnetic Telegraph Company in Cobb Superior Court and conveyance thereunder, the record in said suit being destroyed when the court house and its contents in Cobb County were destroyed during the Civil War, a copy thereof cannot be set forth, and because of lapse of time and the loss as defendant believes of conveyances under that decree copies thereof cannot be set forth.
8. An agreement executed and delivered on the 12th day of August, 1858 by said Alvin P. Hammett to William S. Morris et al. copy of which is attached to defendant's original answer as Exhibit 2, to which leave of reference is prayed with the same force and effect as if the same were herein set forth.
9. A deed dated September 1st, 1858 from the said Alvin D. Hammett to said William S. Morris et al., a copy of which is attached to defendant's original answer as Exhibit 3 to which leave of reference is prayed with the same force and effect as if the same were herein set forth.
10. A deed dated November 13th, 1858 from the said George L. Willy to William S. Morris et al., copy of which is attached to defendant's original answer as Exhibit 4, to which leave of reference is prayed with the same force and effect as if the same were herein set forth.
11. A deed dated December 28th, 1859 from said William S. Morris et al. to the American Telegraph Company, a copy of which [fol. 279] conveyance is attached to defendant's original answer as Exhibit 5, to which leave of reference is prayed with the same force and effect as if the same were herein set forth.
12. A report or letter of the Confederated Telegraph Company, copy of which is attached hereto as Exhibit 20.

13. A release, quit-claim and assignment dated June 20th, 1865 from the Confederated Telegraph Company to the American Telegraph Company, copy of which is hereto attached marked Exhibit 21, to which leave of reference is prayed with the same force and effect as if herein set forth.

14. An agreement dated June 12th, 1866 between the American Telegraph Company and defendant, copy of which is attached to the original answer of defendant as Exhibit 6, to which leave of reference is prayed with the same force and effect as if the same were herein set forth. The respective boards of directors of said American Telegraph Company and of said Western Union Telegraph Company defendant, subsequently ratified and approved said agreement.

15. A contract between the State of Georgia and Western Union Telegraph Company, dated August 18th, 1870, copy of which is attached to the original answer of defendant as Exhibit 7 and to which leave of reference is prayed with the same force and effect as if herein set forth.

16. An act of the General Assembly of Georgia approved August 26th, 1872 entitled "An act to empower and authorize telegraph companies in this State to construct maintain and operate their lines upon the right of way of the several railroad companies of this State."

[fol. 280] 17. A judgment rendered in the United States Circuit Court for the Northern District of Georgia in a suit brought by the Western Union Telegraph Company against the Western & Atlantic Railroad Company upon the mandate of the Supreme Court of the United States in a judgment by it rendered on an appeal in said cause and the decision of the Supreme Court in said cause reported in 91 U. S. 283.

18. An agreement between the Western Union Telegraph Company and the Western & Atlantic Railroad Company, and a resolution of the executive committee of the Western & Atlantic Railroad Company, copies of which are attached to defendant's original answer as Exhibits 8 and 9 respectively, and to which leave of reference is prayed with the same force and effect as if herein set forth.

Jurat showing the foregoing was duly sworn to by R. F. Ragsdale omitted in printing.

This amendment is allowed, subject to demurrer. This Jan. 13, 1921.

J. T. Pendleton, Judge S. C. A. C.

[File endorsement omitted.]

[fol. 281] FULTON SUPERIOR COURT, MARCH TERM, 1920

[Title omitted]

MOTION TO STRIKE AMENDMENTS OF DEFENDANT'S ANSWER—Filed  
Mar. 21, 1921

Now come the plaintiffs in the above stated cause and move to have stricken from the amendments to the answer of defendant therein, said amendments having been filed January 13th, 1921, the following portions of said amendments:

1. Plaintiffs move to have stricken the following portion of paragraph number XVI of said amendments, to-wit:

"Offering, among other things, to grant to said Garst & Bean the use of the right of way for the construction, maintenance and operation of such lines of telegraph without limit, which offer was for an easement for said telegraph lines without limit and perpetual in its character."

upon the following grounds:

(1) The letter of Wm. L. Mitchell as Chief Engineer of the Western & Atlantic Railroad, copy of which is alleged to be attached as Exhibit 1 to said amendment, does not contain offer to grant to Garst & Bean the use of the right of way for the construction, maintenance and operation of lines of telegraph, but only proposes to grant the use of the right of way for the Telegraph Company "and to pass its officers and materials along the road free of charge." Plaintiffs insist that said offer, properly construed, was an offer not for the telegraph lines, but for a telegraph line; also, that the offer as appears therefrom, was not for the use of the right of way for the construction, maintenance and operation of lines of telegraph, but shows that the construction, so far as the furnishing and erection of the posts was concerned, was proposed to be by the Western & Atlantic Railroad (or State of Georgia), that is to say the Railroad (or State) was to furnish and erect the posts, its own posts, on its own right of way.

[fol. 282] (2) Especially to that portion of said paragraph XVI alleging that the offer was without limit and was for an easement for said telegraph lines without limit and perpetual in its character, because the alleged copy of the offer does not show an offer for an easement without limit and perpetual in its character. Plaintiffs insist that the offer of an easement without limit and perpetual in its character does not expressly appear in such alleged letter and will not arise by implication therefrom and especially as against the State. And plaintiffs insist, further, that the grant so far as appears from the alleged copy of the offer, was subject to withdrawal by the State upon reasonable terms and at a reasonable time; and that it amounted to no more than a license.

(3) Further upon the ground that it is no where alleged in said paragraph or elsewhere in the answer of defendant or amendments thereof, that the Western & Atlantic Railroad received the credit upon the books of the Telegraph Company, or dividends instead of interest thereon, or was given such representation in the meetings of that Company, as is set forth in said alleged offer. Plaintiffs insist that the grant, whatever grant was made, was for the use of a telegraph company, shown by the allegations of defendant not to have even been in existence at the time of said alleged offer, and that the said grant and the continuance thereof was to be effective only upon the giving of said credit, the allowing of such representation, and paying of such dividends as might be declared from time to time; and it is not alleged that such credit was given, nor whether or not any dividends were declared, nor even that the Company ever had a meeting.

(4) Further upon the ground that there was no authority of law for the Superintendent of the Western & Atlantic Railroad or the Governor of Georgia or the two combined to grant the use of the right of way of the Western & Atlantic Railroad for the construe-[fol. 283] tion, maintenance and operation of telegraph line or lines without limit or an easement for such line or lines without limit and perpetual in its character.

(5) Further, because defendant has denied in its answer as amended that the State is the owner of the Western & Atlantic Railroad, has denied that the State owns the right of way of said railroad, and has denied that the railroad was operated directly by the State in October 1850.

2. Plaintiffs move to strike from paragraph numbered XVII of said amendments, that portion thereof beginning with the words: "Defendant alleges that during the year 1855" and ending with the words: "Georgia Railroad & Banking Company in the State of Georgia," upon the ground that such portion of the amendment is immaterial.

3. Plaintiffs move to strike from said paragraph XVII the words: "record of any deed by any officer or person covering said properties," upon the ground that said words are insufficient to show that no original deed or copy thereof covering said properties is in existence, or if in existence is beyond the power, custody or control of defendant.

4. Plaintiffs move to strike from said paragraph XVII that portion thereof beginning with the words: "Defendant attaches hereto as Exhibits 18 and 19" and ending with the words: "as if herein fully set forth," and well as said Exhibits 18 and 19, upon the ground that the same are immaterial.

5. Plaintiffs move to strike that portion of said paragraph XVII beginning with the words: "Upon information and belief defendant alleges that under said execution" and ending with the words: "Conveyed to A. D. Hammett," because (1) it is not alleged when, where



or by whom the sale and conveyance was made; (2) where was no authority of law for sale, under execution against the Telegraph Company, of perpetual easements and right of way of the Telegraph Company along or upon the Western & Atlantic Railroad right of [fol. 284] way to Hammett or any other individual; (3) No title is shown in said Telegraph Company to such easements and rights of way; (4) There was no authority of law for sale under execution of segregated portions of the easements and right of way of the Telegraph Company.

6. Plaintiffs move to strike that portion of said paragraph XVII beginning with the words: "Upon information and belief defendant alleges that under said judgment" and ending with the words: "G. L. Willy," because (1) it is not alleged when, where or by whom the sale and conveyance were made, (2) there was no authority of law for sale, under execution against the Telegraph Company, of easements of the Telegraph Company along or upon the Western & Atlantic Railroad right of way to Willy or any other individual.

7. Plaintiffs move to strike paragraph numbered XVIII of said amendments because the allegations of the same are immaterial.

8. Plaintiffs move to strike paragraph of said amendments numbered XIX because (1) the agreement therein referred to does not show a conveyance in fee simple of the line of telegraph, poles, wires &c. and perpetual easements therefor situate along the Western & Atlantic Railroad, as described in defendant's original answer, from Atlanta, Georgia, to Chattanooga, Tennessee; (2) Because the allegations of fact in the answer of defendant, and the amendments thereto do not show what title the American Telegraph Company had to said "line of telegraph, poles, wires, &c."; (3) because the allegations of fact made in said answer and amendments do not show title in said American Telegraph Company to "perpetual easements therefor."

9. Plaintiffs move to strike the paragraph of said amendments numbered XX because neither the allegations of fact made therein nor those made in the answer of defendant as amended, show that defendant is seized and possessed of title in fee simple to the telegraph lines mentioned in the petition nor to perpetual easements [fol. 285] for the construction, maintenance and operation thereof in, on, over and through the lands on, over and through which they are situate.

10. Plaintiffs move to strike sub-paragraph 1 of said paragraph XX because the allegations thereof as to the effect of the Act of the General Assembly of Georgia of December 29th, 1847 are, as matter of law, unfounded and unwarranted.

Further because the motion of plaintiffs to strike from the original answer the allegations thereof, substantially and in effect the same as the allegations of said sub-paragraph 1, was sustained and said allegations were stricken by the Court, by order existing and unreversed.

11. Plaintiffs move to strike sub-paragraph 2 of said paragraph XX because:

(1) The alleged contract between the State of Georgia and Garst & Bean is not shown by sufficient allegations of fact to have been a contract executed on behalf of the State of Georgia by any one having authority of law to execute such contract on its behalf.

(2) Because said alleged contract does not show a grant by the State to Garst & Bean of power and authority to construct, reconstruct, maintain and operate in perpetuity line or lines of telegraph upon the right of way of the Western & Atlantic Railroad. Further, because said alleged contract does not show any grant to Garst & Bean to assign or convey the right to construct, maintain and operate such line or lines of telegraph.

(3) Because it is not alleged either in the original answer of defendant or in the amendments thereto that the Western & Atlantic Railroad received the credit upon the books of the Telegraph Company or dividends instead of interest thereon, or was given such representation in the meetings of that Company, as is set forth in said alleged contract.

12. Plaintiffs move to strike sub-paragraph 3 of said paragraph XX, because:

[fol. 286] (1) The Act of January 27th, 1852, therein referred to does not contain a gift or grant by the State of Georgia to the Augusta, Atlanta & Nashville Magnetic Telegraph Company of power and authority to construct, reconstruct, maintain and operate in perpetuity the lines of telegraph now owned and operated by defendant and referred to in the petition; nor gift or grant to predecessors in title of defendant "of the easements and interest in said right of way and land necessary and useful for the construction, reconstruction, maintenance and operation in perpetuity of said lines of Telegraph."

(2) The allegations of fact made in the answer and amendments thereof do not show the making of a contract between the Chief Engineer of the Western & Atlantic Railroad, and Garst & Bean on the part of said Company, but only the making of a provisional agreement, the conditions and undertakings of which as to the Augusta, Atlanta & Nashville Magnetic Telegraph Company are not shown to have been carried out or conformed to.

(3) Because the terms of said alleged contract are and were too indefinite and uncertain to be enforced, nor does it appear to what vote the State of Georgia was entitled under said contract.

(4) Because neither the gift or grant which may have been made by the State of Georgia to Garst & Bean, on the part of said Telegraph Company, under said alleged contract, or to said company by the Act of January 27th, 1852 was of a perpetual right.

(5) Because neither the gift or grant which may have been made by the State to Garst & Bean, on the part of said Telegraph Company,

under said alleged contract, or to said Company by the Act of January 27th, 1852, was of an assignable right to erect, construct and maintain a line or lines of telegraph upon the right of way of the Western & Atlantic Railroad.

(6) Because that portion of the said Act of 1852 purporting to ratify and affirm said alleged contract with Garst & Bean, was un-[fol. 287] constitutional, null and void in that it was in contravention of the provisions of the Constitution of Georgia of force and in existence in *the* 1852, providing that no law or ordinance should pass "containing any matter different from what is expressed in the titled thereof," being Sec. XVII of Art. 1 of said Constitution, in that the title of said Act is "An Act to incorporate the Augusta, Atlanta and Nashville Magnetic Telegraph Company," whereas the Act contains a provision for ratifying and affirming a contract made by Garst & Bean on the part of the Company before incorporation of the same, with the Chief Engineer of the Western & Atlantic Railroad for use of right of way of said Railroad.

13. Plaintiffs move to strike that portion of said sub-paragraph 3 of said paragraph XX, which alleges that the Act of January 27, 1852, by Section IX thereof gave the Augusta, Atlanta & Nashville Magnetic Telegraph Company power and authority without limit to put its fixtures upon and along any railroad belonging to the State of Georgia, upon the ground that under and by said Section IX of said Act the grant was of power and authority to set up fixtures "along and across" any railroad then belonging or which might thereafter belong to the State, and not to set up fixtures "upon and along" such railroad or railroads.

14. Plaintiffs move to have stricken sub-paragraph (4) of said paragraph XX from the beginning of said sub-paragraph through the words "Georgia Railroad & Banking Company in the State of Georgia," upon the ground that the same is immaterial.

15. Plaintiffs move to have stricken from said sub-paragraph 4 that portion thereof beginning with the words: "Defendant alleges that thereafter" and ending with the words: "cannot be obtained," upon the grounds: (1) Same is immaterial; (2) It is not alleged when the judgment or decree was rendered, nor what was the judgment or decree rendered, or when the alleged sale or sales was made or by whom or to whom.

16. Plaintiffs move to have stricken from said sub-paragraph 4 the [fol. 288] following: For like reasons no record of any deed by any officer or person conveying said properties, or the report of such sale can be procured" upon the ground: (1) The sale is immaterial, (2) It is not alleged that the original of such deed or report cannot be procured, (3) Said allegation is directly contradictory to the allegations made in said sub-paragraph 4 as to deed of Wiggins, Sheriff, and of Flowers, Sheriff.

17. Plaintiffs move to have stricken that portion of said sub-paragraph 4 beginning with the words: "Attached to the amendment to

defendant's answer filed January 13th, 1921 as Exhibits 18 and 19 are copies of deeds" and ending with the words: "Magnetic Telegraph Company," on the ground that the same is immaterial.

18. Plaintiffs move to have stricken that portion of said sub-paragraph XX because: (1) It does not appear from any sufficient allegation defendant alleges that under said execution" and ending with the words: "conveyed to A. D. Hammett," because: (1) The same is immaterial, (2) There is no sufficient identification of what was the execution referred to, or by whom it was levied, or by whom sales under it were made or when they were made—Especially, as to any sale or sales of "properties, telegraph lines and rights of way of the Augusta, Atlanta & Nashville Magnetic Telegraph Company, situate in the State of Georgia along the Western & Atlanta Railroad," (3) No title is shown in said Telegraph Company to perpetual easements and rights of way for lines of telegraph of said Telegraph Company, "situate in the State of Georgia along the Western & Atlantic Railroad." (4) No authority of law appears, under the allegations of fact made that Hammett had title to any perpetual or assignable rights of way of said Telegraph Company could be segregated and sold at separate sales in parcels by different Sheriffs or Court Officers.

19. Plaintiffs move to have stricken that portion of said sub-paragraph 4 beginning with the words: "Upon information and belief defendant alleges that under said judgment", and ending with [fol. 289] the words: "G. L. Willy," upon the same grounds as those stated in paragraph 18 of this demurrer, (2) Because no authority of law appears, under the facts alleged, for an official sale in Tennessee of property there located under a judgment or decree of the Superior Court of Cobb County, Georgia, (3) Because it is not alleged whether the sale was under judgment or decree of the Superior Court of Cobb County, Georgia, or of some Court in Tennessee, or if the latter what Court.

20. Plaintiffs move to have stricken sub-paragraph 5 of said paragraph XX because the same is immaterial.

21. Plaintiffs move to have stricken sub-paragraph 6 of said paragraph XX because: (1) It does not appear from any sufficient allegations of fact made what title Hammett had to convey to William S. Morris et al. (2) It does not appear from any sufficient allegations of fact made that Hammett had title to any perpetual or assignable easements or rights in any portion of the right of way of the Western & Atlantic Railroad.

22. Plaintiffs move to have stricken sub-paragraph 7 of said paragraph XX because: (1) It does not appear from any sufficient allegation of fact made what title Willy had to convey to Wm. S. Morris et al.; (2) It does not appear from any sufficient allegations of fact made that Willy had title to any perpetual or assignable easements or rights in any portion of the right of way of the Western & Atlantic Railroad.

23. Plaintiffs move to have stricken sub-paragraph 8 of said paragraph XX because : (1) It does not appear from any sufficient allegations of fact made what title William S. Morris, et al. had to convey to the American Telegraph Company; (2) It does not appear from any sufficient allegations of fact made that William S. Morris et al. had title to any perpetual or assignable easement or right in any portion of the right of way of the Western & Atlantic Railroad.

24. Plaintiffs move to have stricken sub-paragraph 9 of said paragraph XX because: (1) The same is immaterial; (2) The same does not show any right or authority in the stockholders and officers [fol. 290] of the American Telegraph Company in the Southern States to assume and take control of the properties of said Telegraph Company in said States either individually or under the name of the Confederated Telegraph Company; or any assignable right in said stockholders and officers or said Confederated Company; (3) The same does not show any reference to any easements or rights of way of or for any telegraph line upon or along the right of way of the Western & Atlantic Railroad.

25. Plaintiffs move to have stricken sub-paragraph 10 of said paragraph XX, because: (1) There are no sufficient allegations of fact made to show assignable rights in the American Telegraph Company to an easement or a perpetual easement in or upon any portion of the right of way of the Western & Atlantic Railroad; (2) No sufficient allegation of fact is made to show authority for the execution of the agreement of June 12th, 1866, or that ratification and approval by the boards of directors of the two telegraph companies gave force or validity thereto, no action by the stockholders of said companies being alleged.

26. Plaintiffs move to have stricken sub-paragraph 11 of said paragraph XX because: (1) There was no authority of law in the Superintendent of the Western & Atlantic Railroad to make or give in behalf of the State of Georgia, the alleged permit and grant, either with or without the consent of the Governor of the State of Georgia; (2) Plaintiffs heretofore moved to strike allegations similar to those in said sub-paragraph 11, contained in sub-paragraph 10 of paragraph VI of the original answer of the defendant, and said motion was sustained by the Court, by order still of force.

27. Plaintiffs move to strike sub-paragraph 12 of said paragraph XX, of the amendments to the answer of defendant, from the beginning thereof down to the words: "August 26th, 1872"—because: (1) The Act of August 26th, 1872 contains no permit or grant such as is alleged by defendant.

28. Plaintiffs move to strike that portion of said paragraph XX following the portion thereof last herein above referred to, down to [fol. 291] the end of said paragraph, because the same contains mere general allegations of title in defendant unsupported by sufficiently specific allegations of fact, under the laws of this State, to show such title.

29. Plaintiffs move to strike from said portion of said paragraph XX herein last above referred to, that part thereof in which is asserted title in defendant or its predecessors under the Act of December 29th, 1847, because: (1) Said Act does not give or confer the right claimed hereunder by defendant; (2) The allegations of fact made do not show any right or title acquired thereunder by defendant's predecessors.

30. Plaintiffs move to have stricken that portion of paragraph XXI of said amendments beginning with the words "This defendant alleges that the State of Georgia," and ending with the words: "incident to such ownership and business when carried on by individuals" because:

(1) The allegations therein made set up no good defense under the laws of this State. (2) It is shown by the public laws of this State that the ownership by the State of Georgia of the Western & Atlantic Railroad is in its sovereign capacity and that as to such ownership it did not and has not waived its sovereign character as alleged and is not subject to the laws and regulations applicable to and binding upon private persons, private corporations and ordinary railroad corporations, owning, constructing, maintaining and operating a railroad, and has not assumed all the obligations and all of the liabilities incident to such ownership and business when carried on by individuals. (3) The allegations of said portion of said paragraph XXI are but repetitions in substance and effect of similar allegations made in the original answer of defendant as to which motion to strike by plaintiffs has been already sustained by the unreversed and existing order of this Court.

31. Plaintiffs move to have stricken that portion of said paragraph XXI, immediately following that portion of the same last above [fol. 292] herein referred to, and beginning with the words: "And this defendant and its predecessors in title" and ending with the words: "this defendant and its predecessors in title hereinafter alleged," because: (1) The same is a mere general statement of a conclusion of the pleader, unsupported by specific statements of fact. (2) No such grants, permits or contract by the State of Georgia with defendant and its predecessors in title is stated in said paragraph or elsewhere in said amendments or in the answer of defendant, as are sufficient to show acquisition of title by defendant and its predecessors in title to the right of way of the Western & Atlantic Railroad or an easement therein now existing.

32. Plaintiffs move to have stricken that portion of said paragraph XXI immediately following the portion thereof herein last above referred to, beginning with the words: "And under the conduct and action," and ending with the words: "and ordinary railroad corporations," because: (1) The same is a mere general statement of conclusions of the pleader, unsupported by sufficient specific statements of fact as to the claims therein made of action and non-action by the State of Georgia, and of adverse use and possession as against said State. (2) Because no such adverse use and possession of the right



of way of the Western & Atlantic Railroad or any easement therein, and no action or non-action by said State is shown in said paragraph or elsewhere in defendant's answer as would give to defendant, or would ripen in favor of defendant into title to said right of way or an easement therein. (3) Because neither non-action by the State of Georgia, nor the alleged adverse use and possession by defendant and its predecessors in title, would suffice to give to defendant title to said right of way or to an easement therein.

33. Plaintiffs move to have stricken from said portion of said paragraph XXI the allegations thereof as to non-action by the State of Georgia, because: (1) No such non-action by the State of Georgia is alleged therein or elsewhere in defendant's answer as would suffice [fol. 293] to give to defendant, or would cause to ripen in favor of defendant into title to said right of way or an easement therein. (2) Because non-action by said State would not suffice to give such title to defendant or cause the ripening of such title in defendant by adverse possession of itself or itself and its predecessors in title. Under the laws of Georgia as to its ownership of the Western & Atlantic Railroad and the right of way thereof, no prescription runs against the State, and no laches or non-action on the part of its officers will deprive it of its right to the public domain included in which is said Western & Atlantic Railroad and the right of way thereof. (3) Because the matters set up by way of defence in said portion of said paragraph XXI were set up and asserted in the original answer of defendant and were stricken therefrom by previous order of this Court, unreversed, on motion of plaintiffs.

34. Plaintiffs move to have stricken that portion of said paragraph XXI beginning with the words: "Attached hereto as Exhibit 22," and ending with the words: "As if fully herein set forth," because: (1) Said alleged abstract of title does not set forth conveyances and muniments of title sufficient to show acquisition of title by defendant or by it and its predecessors, or sufficient to show muniments of title which accompanied by adverse possession would ripen into title in defendant. (2) As to the alleged various conveyances and muniments of title, for the reasons set forth herein above and hereinafter with respect to same.

35. Plaintiffs move to have stricken that portion of said paragraph XXI beginning with the words: "Each predecessor in title" and ending with the words: "In title as set forth in Exhibit 22," because: (1) The same consists of mere general statements and conclusions of the pleader, not supported by specific statements of fact to sustain the same. (2) The same is an attempt on the part of defendant to set up as against the State of Georgia title by prescription to right of way on and over and easement in the right of way of the Western & Atlantic Railroad, for which there is no provision in the laws of [fol. 294] Georgia. Under the laws of Georgia as to its ownership of the Western & Atlantic Railroad and the right of way thereof, no prescription runs against the State. (3) Because the matters set up by way of defence in said portion of said paragraph XXI were set up



and asserted by the defendant in the original answer of the defendant and were stricken therefrom by the previous order of this Court, unreserved, on motion of plaintiffs.

36. Plaintiffs move to have stricken that portion of said paragraph XXI beginning with the words: "The General Assembly of the State of Georgia" and extending through the remainder of said paragraph, because: (1) The same is immaterial; (2) In so far as the provisions set forth, of the Act of March 6th, 1856, are still of force in this State, they have no applicability to the rights of the State of Georgia in and to the Western & Atlantic Railroad and the right of way thereof. (3) Because as to said right and right of way no prescription or statute of limitation, or provision in said statute as to laches is applicable to the State of Georgia as to the ownership by said State of the Western & Atlantic Railroad or the right of way thereof. (4) Because the matters set up by way of defence in said portion of said paragraph XXI were set up and asserted by defendant in its original answer and were stricken therefrom on motion of plaintiffs by the previous, unreversed order of this Court.

37. Plaintiffs move to have stricken that portion of paragraph XXII of said amendments beginning with the words: "The defendant alleges that the State of Georgia embarked," through the words: "incident to such ownership and business when carried on by individuals," because: (1) The allegations therein made set up no good defence under the laws of this State. (2) It is shown by the public laws of this State that the ownership by the State of Georgia of the Western & Atlantic Railroad and the rights of way thereof, is in its sovereign capacity and that as to such ownership it did not and has not waived its sovereign character, as alleged, and is not subject to the laws and regulations applicable to and binding upon [fol. 295] private persons, private corporations and ordinary railroad corporations, owning, constructing, maintaining and operating a railroad, and has not assumed all the obligations and all of the liabilities incident to such ownership and business when carried on by individuals. (3) The allegations of said portion of said paragraph XXII are but repetitions in substance and effect of similar allegations made in the original answer of this defendant as to which motion to strike by plaintiffs has been already sustained by the unreversed and existing order of this Court.

38. Plaintiffs move to strike that portion of said paragraph XXII immediately following the portion thereof last hereinabove mentioned, beginning with the words: "And this defendant and its predecessors in title" and ending with the words: "this defendant and its predecessors in title hereinafter alleged." because: (1) The same is a mere general statement of a conclusion of the pleader, unsupported by specific statements of fact. (2) No such grants, permits or contracts by the State of Georgia to or with defendant and its predecessors in title are stated in said paragraph or elsewhere in said amendments or in the answer of defendant, as are sufficient to show acquisition of title by defendant and its predecessors in title to

the m  
there

39.

XXI  
state  
action  
ratio  
clusi  
of fa  
the S  
said  
[fol.  
ment  
said  
defen  
right  
action  
sion  
to de

40.

parag  
State  
Georg  
woul  
favor  
there  
give  
defen  
title.  
ern &  
of th  
State.  
priv  
West  
cause  
parag  
this C

41.

graph  
hibit  
forth,  
conve  
[fol. 2  
cient  
session  
various  
forth

42.

graph

the right of way of the Western & Atlantic Railroad, or an easement therein now existing.

39. Plaintiffs move to have stricken that portion of paragraph XXII immediately following the portion thereof last hereinabove stated, beginning with the words: "and under the conduct and action," and ending with the words: "and ordinary railroad corporations," because: (1) the same is a mere general statement of conclusions of the pleader, unsupported by sufficient specific statements of fact as to the claims therein made of action and non-action by the State of Georgia, and of adverse use and possession as against said State. (2) Because no such adverse use and possession of the [fol. 296] right of way of the Western & Atlantic Railroad or an easement therein and no action or non-action by said State is shown in said paragraph or elsewhere in defendant's answer as would give to defendant, or would ripen in favor of defendant into, title to said right of way or an easement therein. (3) Because neither non-action by the State of Georgia, nor the alleged adverse use and possession by defendant and its predecessors in title, would suffice to give to defendant title to said right of way or to an easement therein.

40. Plaintiffs move to have stricken from said portion of said paragraph XXII the allegations thereof as to non-action by the State of Georgia because: (1) No such non-action by the State of Georgia is alleged therein, or elsewhere in defendant's answer, as would suffice to give to defendant, or would cause to ripen in favor of defendant into, title to said right of way or an easement therein. (2) Because non-action by said State would not suffice to give such title to defendant, or cause the ripening of such title in defendant by adverse possession of itself and its predecessors in title. Under the laws of Georgia, as to its ownership of the Western & Atlantic Railroad and the right of way thereof, and the title of the State of Georgia thereto, no prescription runs against the State, and no laches or non-action on the part of its officers will deprive it of its right to the public domain, included in which is said Western & Atlantic Railroad and the right of way thereof. (3) Because the matters set up by way of defence in said portion of said paragraph XXII were set up and asserted in the original answer of this Court, unreversed and now existing, on motion of the plaintiffs.

41. Plaintiffs move to have stricken that portion of said paragraph XXII, beginning with the words: "Attached hereto as Exhibit 22" and ending with the words: "As if fully herein set forth," because: (1) Said alleged abstract of title does not set forth conveyances and muniments of title sufficient to show acquisition [fol. 297] of title by defendant or by it and its predecessors, or sufficient to show muniments of title which accompanied by adverse possession would ripen into title in defendant. (2) As to the alleged various conveyances and muniments of title, for the reasons set forth hereinabove and hereinafter with respect to the same.

42. Plaintiffs move to have stricken that portion of said paragraph XXII beginning with the words: "Each predecessor in title"

and extending to the end of said paragraph, because: (1) The same consists of mere general statements and conclusions of the pleader, not supported by sufficient specific statements of fact to sustain the same. (2) No such adverse possession by defendant or by defendant and its alleged predecessors in title, nor such adverse possession under color of title, is shown as would give to defendant title or as would ripen into title in it as against the State of Georgia in or to the right of way of the Western & Atlantic Railroad or an easement therein. (3) No such adverse use or possession as is alleged would give to, or ripen into in defendant title as against the State of Georgia to the right of way of the Western & Atlantic Railroad, or an easement therein, because under the laws of Georgia, as to the ownership by the State of Georgia of the Western & Atlantic Railroad and right of way thereof, and the title of the State of Georgia thereto, no prescription runs against said State, and no laches or non-action by it or on the part of its officers, will deprive it of its right to the public domain, included in which is the Western & Atlantic Railroad and the right of way thereof. (4) The defence attempted to be set up was made in the original answer of defendant, and was stricken therefrom, on motion of plaintiffs, by order of the Court heretofore rendered, which is still existing and unreversed.

43. Plaintiffs move to have stricken that portion of paragraph numbered XXIII of said amendments, beginning with the words: "This defendant alleges that the State of Georgia embarked" down to the words: "Attached hereto as Exhibit 22 is an abstract," because: (1) The same is a mere general statement of conclusions of [fol. 298] the pleader, without being supported in said paragraph or elsewhere in defendant's answer with a sufficiently specific statement of fact to sustain the same. (2) The allegations made set up no good defence under the laws of Georgia or the laws of Tennessee. (3) Under the law the ownership by the State of Georgia of the Western & Atlantic Railroad from Atlanta, Georgia, to Chattanooga, Tennessee, and of the right of way thereof is an ownership in its sovereign capacity, and the legislative enactments referred to or set forth in said paragraph do not otherwise provide, and as to the said ownership the State of Georgia is not subject to the laws and regulations applicable to and binding upon private corporations, private persons and ordinary railroad corporations, and did not assume all of the obligations and liabilities incident to such ownership and business when carried on by individuals; and is not subject to statutes of prescription or limitation set forth or referred to in said paragraph. (4) Because the defence attempted to be set up was alleged in the original answer of defendant and was stricken therefrom, on motion of plaintiffs, by order of this Court heretofore passed and still existing, unreversed.

44. Plaintiffs move to have stricken that portion of said paragraph XXIII beginning with the words: "Attached hereto as Exhibit 22 is an abstract" and ending with the words: "as if fully

herein set forth," because (1) said alleged abstract does not set forth conveyances and muniments of title sufficient to show acquisition of title by defendant or by it and its predecessors, or sufficient to show muniments of title which accompanied by adverse possession would ripen into title in defendant. (2) As to the alleged various conveyances and muniments of title, for the reason hereinbefore and hereinafter set forth.

45. Plaintiffs move to have stricken from said paragraph XXIII that portion thereof beginning with the words: "Each predecessor in title of defendant" down to the end of said paragraph, because: (1) The same sets up no defence good in law as against plaintiff's [fol. 299] suit. (2) Because as to the ownership by the State of Georgia of the Western & Atlantic Railroad in Tennessee and of the right of way thereof, the same is in the State of Georgia in its sovereign capacity and no prescription runs against said State, nor is a defense of laches or non-action by it or its officers good as against it with reference thereto or to an easement in said right of way. (3) The defence sought to be set up was made and alleged in the original answer of defendant and, on motion of plaintiffs, has heretofore been stricken by order of this Court still existing and unreversed.

46. Plaintiffs move to have stricken that portion of paragraph XXIV of said amendments, beginning with the words: "The State of Georgia embarked," through the words: "incident to such ownership and business when carried on by individuals," because: (1) The allegations made set up no good defense under the laws of this State: (2) The ownership by the State of Georgia, under the law, of the Western & Atlantic Railroad and the right of way thereof, is in its sovereign capacity, and as to the same it is not subject to the laws and regulations applicable to or binding upon private persons, private corporations and ordinary railroad corporations, owning, constructing, maintaining and operating a railroad; and the State of Georgia has not, under the law, by embarking in the construction and operation of the Western & Atlantic Railroad waived its sovereign character as to the ownership of said railroad and the right of way thereof. (3) The allegations made in said portion of said paragraph XXIV are but repetitions in substance of similar allegations made in the original answer of defendant, which were stricken therefrom, on motion of plaintiffs, by order of this Court still existing and unreversed.

47. Plaintiffs move to have stricken that portion of said paragraph XXIV immediately following the portion last above mentioned, beginning with the words: "And this defendant and its predecessors in title," and ending with the words: "this defendant and its predecessors in title hereinafter alleged," because: (1) The [fol. 300] same is a mere general statement of a conclusion of the pleader, unsupported by specific statements of fact. (2) No such grants, permits or contracts by the State of Georgia to or with defendant and its predecessors in title are stated in said paragraph or

in said amendments or elsewhere in the answer of defendant, as are sufficient to show acquisition of title by defendant and its predecessors in title to the right of way of the Western & Atlantic Railroad, or an easement therein now existing.

48. Plaintiffs move to have stricken from said paragraph XXIV that portion thereof immediately following the portion last above mention-, beginning with the words: "And under the conduct and action or non-action" and ending with the words: "6 Heisk. 634", because: (1) The same is a mere general statement of conclusions of the pleader, unsupported by sufficient specific statements of fact as to the claims therein made of action and non-action by the State of Georgia and of adverse use and possession as against said State. (2) Because no such adverse use and possession of the right of way of the Western & Atlantic Railroad or an easement therein and no action or non-action by said State is shown in said paragraph or elsewhere in defendant's answer, as would give to defendant, or would ripen in favor of defendant into, title to said right of way or an easement therein. (3) Because neither non-action by the State of Georgia, nor the alleged adverse use and possession by defendant and its predecessors in title, would be sufficient to give to defendant title to said right of way or to an easement therein.

49. Plaintiffs move to have stricken that portion of said paragraph XXIV immediately following the portion herein last above mentioned, beginning with the words: "Attached hereto as Exhibit 22" and ending with the words: "as if fully herein set forth", because: (1) Said alleged abstract of title does not set forth conveyances and muniments of title sufficient to show acquisition of title by defendant or by it and its predecessors, or sufficient to show muniments of title which, accompanied by adverse possession would ripen into title in [fol. 301] defendant. (2) As to the various alleged conveyances and muniments of title, for the reasons set forth hereinabove and hereinafter with respect to same.

50. Plaintiffs move to have stricken from said paragraph XXIV the portion thereof immediately following the portion hereinabove last mentioned, beginning with the words: "Each predecessor in title of defendant" and ending with the words: "as set forth in Exhibit 22", because: (1) The same consists of mere general statements of conclusions of the pleader, not supported by sufficient specific statements of fact to sustain the same. (2) No such adverse possession by defendant or by defendant and its alleged predecessors in title, nor such adverse possession under color of title is shown as would give to defendant title, or would ripen into title in it, as against the State of Georgia, in or to the right of way of the Western & Atlantic Railroad, or an easement therein. (3) No such adverse use or possession as is alleged would give to, or ripen into *in*, defendant title as against the State of Georgia to the right of way of the Western & Atlantic Railroad, or an easement therein, because under the law, as to ownership of the Western & Atlantic Railroad and right of way thereof, no prescription runs against said State, and

no laches or nonaction by it or on the part of its officers, will deprive it of its right to the public domain, included in which is the Western & Atlantic Railroad and the right of way thereof. (4) The defense attempted to be set up was made in the original answer of defendant, and was stricken therefrom, on motion of plaintiffs, by order of this court heretofore rendered, which is still existing and unreversed.

51. Plaintiffs move to have stricken that portion of said paragraph, immediately following that hereinabove last referred to, beginning with the words: "The State of Georgia has given and granted" and ending with the words: "Approved November 12th, 1889", because: (1) No such grants or permits are set forth as would be sufficient in law to give to defendant and its predecessors, the [fol. 302] right in perpetuity to construct, maintain and operate the lines of telegraph mentioned, or to take, use, possess and enjoy in perpetuity the land and easements and interest in land alleged to have been taken, used, possessed and enjoyed by defendant and its predecessors. (2) Specifically to each of the specific claims of grants or permits by the State of Georgia and as to Acts of the General Assembly of Georgia, for the reasons hereinbefore, and in the motion to strike defendant's answer specifically set forth. (3) To all of said portion of said paragraph, except sub-paragraphs (b) and (c) thereof, because the same was in substance set forth and alleged in the original answer of defendant and was stricken therefrom on motion of plaintiffs, by order of this Court which order is still existing and unreversed.

52. Plaintiffs move to have stricken that portion of said paragraph XXIV beginning with the words: "After the execution and delivery" and ending with the words: "and leave of reference thereto is prayed with the same force and effect as if herein set forth", because: (1) The same is immaterial. (2) The same sets up by way of defense matters and things with which it is not alleged that either of plaintiffs were a party or connected. (3) The same in substance was stricken from defendant's original answer by order of this Court, still existing and unreversed.

53. Plaintiffs move to strike that portion of said paragraph XXIV beginning with the words: "By a resolution" and ending with the words: "Equities of the parties in the subject matter", because: (1) The same is immaterial. (2) The same sets forth no good matter of defense to plaintiff's suit. (3) None of the resolutions therein referred to, have in law, the effect alleged. (4) In substance the same was set up in defendant's original answer, and was stricken therefrom, on motion of plaintiffs, by order of this Court, which is still existing and unreversed.

54. Plaintiffs move to have stricken that portion of said paragraph XXIV, beginning with the words: "The Constitution of the United [fol. 303] States" and ending with the words: "said accepted Act of Congress", because: (1) The same is immaterial. (2) There



is no warrant of law for the claims therein made as to matters of fact, and no sufficient specific allegations of fact made therein to sustain the claims and conclusions therein set out. (3) The same allegations were made in the original answer of the defendant and were stricken, on motion of plaintiffs, by this Court, by its order heretofore made, still existing and unreversed.

55. Plaintiffs move to have stricken that portion of said paragraph XXIV, beginning with the words: "This defendant having, as herein alleged"; and ending with the words: "Under and by said accepted Act of Congress", because, (1) The same is a mere general statement of conclusions of the pleader, unsupported by sufficient specific statement of fact to sustain the same. (2) Further to that portion of the same as to acceptance of the Act of Congress and permit granted by Congress, because the same are immaterial.

56. Plaintiffs move to strike that portion of said paragraph XXIV, beginning with the words: "The predecessors in title of this defendant and this defendant itself" and ending with the words: "under and because of the following facts," because: (1) The same is a mere general statement of conclusions of the pleader, unsupported by sufficient specific allegations of fact to sustain the same. (2) The same was set forth and alleged in the original answer of defendant and was stricken therefrom, on motion of plaintiffs, by order of this Court still existing and unreversed.

57. Plaintiffs move to have stricken that portion of said paragraph XXIV, beginning with the words: "The cost or value" and ending with the words: "to perform its said duties and obligations", because: (1) The same is immaterial. (2) The same was set up and alleged in the original answer of defendant and was stricken therefrom, on motion of plaintiffs, by order of this Court still existing and unreversed.

[fol. 304] 58. Plaintiffs move to have stricken that portion of said paragraph XXIV beginning with the words: "Under the facts as herein alleged" and extending to the end of said paragraph XXIV, because: (1) The same is a mere general statement of conclusions of the pleader, unsupported by sufficient specific statement of facts to sustain the same. (2) No facts are alleged sufficient, under the law, to warrant the interposition of an equitable bar to the claims of plaintiffs. (3) To the allegation as to the Act of March 6th, 1856 and paragraphs 4369 and 4371 of the Code of Georgia, because the same are inapplicable to the State of Georgia, as to its ownership of the Western & Atlantic Railroad and the right of way thereof, and to the claims of defendant as to prescription or laches of said State with regard to the same.

59. Plaintiffs move to have stricken paragraph XXV of said amendments, because: (1) Neither the Act of November 30th, 1915, nor the resolutions of the Western & Atlantic Railroad Commission, copy of which is attached to the original answer of defendant, nor any judgement or decree of this Court giving to the said statute the



force and effect claimed by plaintiffs in this suit, nor any judgment or decree upholding, giving the effect to or enforcing said resolution or granting the prayers of the petition, would be violative of the Constitution of Georgia or of the United States, as claimed by defendant. (2) The same allegations were made in the original answer of defendant and were stricken therefrom, on motion of plaintiffs, by order of this Court heretofore passed, still existing and unreversed.

60. Plaintiffs renew as to the answer as amended the motion to strike heretofore filed by plaintiffs upon each and all of the grounds thereof.

W. A. Wimbush, Tye, Peebles & Tye, Attorneys for Plaintiffs.

[File endorsement omitted.]

[fol. 305]

#### IN FULTON SUPERIOR COURT

##### ORDER ON PLAINTIFFS' MOTION TO STRIKE

The within motion to strike portions of the amendments Jany. 13th, 1921 filed by defendant to its answer in the within case coming on to be heard, after agreement had. It is considered ordered and adjudged that the following paragraphs of said motion be and they are hereby sustained, to-wit: Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, and 59. Sub-paragraphs, 1, 3, 4 and 5 of par. 12 of said motion are overruled and sub-paragraphs 2 and 6 of said paragraph 12 are sustained; paragraph 13 of said motion is overruled sub-paragraph 1 of per. 25 of said motion is sustained, and sub-paragraph 2 of said par. 25 is overruled. Except as appears from the rulings of the Court above stated and upon the motion to strike the original answer of the Defendant and portions thereof, paragraph 60 of the within motion to strike is overruled.

This June 22, 1921.

J. T. Pendleton, Judge Superior Court, Fulton County.

[fol. 306]

#### FULTON SUPERIOR COURT

[Title omitted]

##### ORDER STRIKING CERTAIN PARTS OF AMENDMENT TO ANSWER

Be it remembered that at the May Term, 1921, of the Superior Court of Fulton County, Georgia, the motion of the plaintiffs in the above cause to strike the amendments to the answer of the defendant therein, and to strike certain portions of said amendments to answer

came on to be heard, and after argument the following judgment was rendered by said court on June 22nd, 1921, and during the said May Term, 1921, to-wit:

"The within motion to strike portions of the amendments of Jan'y. 13th, 1921, filed by defendant to its answer in the within case, coming on to be heard, after argument had, it is considered, ordered and adjudged that the following paragraphs of said motion be, and they are hereby sustained, to-wit, paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, and 59.

"Sub-paragraphs 1, 3, 4 and 5 of paragraph 12 of said motion are overruled and sub-paragraphs 2 and 6 of said paragraph 12 are sustained; paragraph 13 of said motion is overruled; sub-paragraph 1 of paragraph 25 of said motion is sustained, and sub-paragraph 2 of said paragraph 25 is overruled.

"Except as appears from the rulings of the Court above stated and upon the motion to strike the original answer of defendant and portions thereof, paragraph 60 of the within motion to strike is over-[fol. 307] ruled.

"This June 22nd, 1921.

J. T. Pendleton, Judge Superior Court, Fulton County."

---

#### IN FULTON SUPERIOR COURT

#### DEFENDANT'S BILL OF EXCEPTIONS

To so much of said judgment as sustains the said motion of the said plaintiffs and as sustains the several grounds or paragraphs of said motion therein stated to be sustained by the court, said defendant, the Western Union Telegraph Company, then and there excepted and now excepts; and now before final judgment in said cause, and during the same term at which said judgment complained of was rendered, the said Western Union Telegraph Company comes and *expects* to so much of said judgment as sustains the said motion of the said plaintiffs, and as sustains the several grounds or paragraphs of said motion therein stated to be sustained by the court, and assigns error thereon.

In addition to the foregoing general assignment and specification of error this defendant further assigns error upon said judgment as follows:

1. Said judgment is erroneous in sustaining each of the paragraphs of said motion sustained upon the grounds therefor in each of said paragraphs stated. This assignment of error applies to each paragraph sustained with the same force and effect as if separately made as to each such paragraph sustained.

2. Said judgment is erroneous in sustaining each of the paragraphs of said motion sustained in that thereby there are stricken from defendant's answer allegations which this defendant has the right to make in its defense in said cause, and which it is entitled to prove in its defense upon trial of the cause. This assignment of error applies to each paragraph sustained and to each portion of said paragraph stricken with the same force and effect as if separately made as to each paragraph sustained and as to each portion of the answer stricken.

3. Said judgment is erroneous in sustaining each of the paragraphs of said motion sustained in that thereby this defendant is [fol. 308] deprived of its right to plainly, fully and distinctly answer the petition in the cause. This assignment of error applies to each paragraph sustained with the same force and effect as if separately made as to each such paragraph sustained.

4. Said judgment is erroneous in striking Paragraph XX of the amendment to defendant's answer which said paragraph pleads matters in defense which defendant is entitled to plead and to prove. The court erred in sustaining each of the grounds of the motion to strike said Paragraph XX and portions thereof, being grounds of said motion 9 to 29 inclusive.

5. Said judgment is erroneous in striking Paragraph XXI of the amendment to defendant's answer which said paragraph pleads matters in defense which defendant is entitled to plead and to prove. The court erred in sustaining each of the grounds of the motion to strike said Paragraph XXI and portions thereof, being grounds of said motion 30 to 36, inclusive.

6. Said judgment is erroneous in striking Paragraph XXII of the amendment to defendant's answer which said paragraph pleads matters in defense which defendant is entitled to plead and to prove. The court erred in sustaining each of the grounds of the motion to strike said Paragraph XXII and portions thereof, being grounds of said motion 37 to 42 inclusive.

7. Said judgment is erroneous in striking Paragraph XXIII of the amendment to defendant's answer which said paragraph pleads matters in defense which defendant is entitled to plead and to prove. The court erred in sustaining each of the grounds of the motion to strike said Paragraph XXIII and portions thereof, being grounds of said motion 43 to 45 inclusive.

8. Said judgment is erroneous in striking Paragraph XXIV of the amendment to defendant's answer which said paragraph pleads matters in defense which defendant is entitled to plead and to prove. The court erred in sustaining each of the grounds of the motion to strike said Paragraph XXIV and portions thereof, being grounds of said motion 46 to 58 inclusive.

[fol. 309] 9. Said judgment is erroneous in striking Paragraph XXV of the amendment to defendant's answer which said paragraph

pleads matters in defense which defendant is entitled to plead and to prove. The court erred in sustaining the ground of the motion to strike said Paragraph XXV and portions thereof, being ground of said motion 59.

10. Said judgment is further erroneous in ruling upon paragraph 60 of plaintiff's motion to strike the amendment to defendant's answer, the ruling or judgment thereupon being:

"Except as appears from the rulings of the Court above stated and upon the motion to strike the original answer of defendant and portions thereof, paragraph 60 of the within motion to strike is overruled."

Said ruling and judgment is erroneous in that it is ambiguous, uncertain and it does not clearly appear therefrom to what extent or in what particulars said Paragraph 60 of said motion to strike is overruled or sustained. Insofar as said Paragraph 60 of said motion to strike is sustained error is assigned thereon upon the grounds (1) that the same is erroneous in sustaining the said motion upon the grounds thereof; (2) Defendant is entitled to plead and prove each of such portions of its original answer as may be stricken by said judgment upon Paragraph 60 of said motion to strike. This assignment of error applies to each and every separate portion of said answer which may be stricken by the ruling or judgment upon said paragraph 60 of said motion to strike as if each were separately enumerated.

And the said Western Union Telegraph Company within 30 days of the rendition of said judgment, and during the term at which it was rendered, excepts thereto insofar as the same sustains the plaintiffs' motion to strike its answer and to strike portions thereof, and assigns error thereon, and tenders this, its bill of exceptions pendente lite for the purpose of being made a part of the record, and prays that the same be certified to be true by the Judge and be ordered filed [fol. 310] and placed on the record as a part of the record in said cause.

Brewster, Howell & Heyman, W. L. Clay, Attorneys for Western Union Telegraph Co.

I do certify that the foregoing bill of exceptions pendente lite is true and the same is hereby ordered filed and made a part of the record in this cause.

In open court this July 1st, 1921 during the May Term, 1921 of Fulton Superior Court.

J. T. Pendleton, Judge S. C. A. C.

[fol. 311]

## IN FULTON SUPERIOR COURT

**Brief of Evidence**—Filed Oct. 31, 1922

## EXHIBITS IN EVIDENCE

The plaintiff introduced the following evidence:

Georgia Code, Paragraph 1287.—“The railroad communication from Atlanta, in Fulton County, to Chattanooga, on the Tennessee river is the property of this State exclusively, and shall be known as the Western & Atlantic Railroad.”

Georgia Code, Paragraph 1515.—“For the support and maintenance of the common schools of this State, the poll tax, special tax on shows and exhibitions, dividends upon the stock of the State in the Bank of the State of Georgia, Georgia Railroad and Banking Company, and such other means or moneys as now belong to the common school fund, and one half of the proceeds of the rental of the Western & Atlantic Railroad, or one half of the annual net earnings of said railroad under any change of policy which the State may adopt hereafter; all endowments, devises, gifts and bequests made, or to be made, to the State or State board of education; the proceeds of any commutation tax for military services, all taxes that may be assessed on such domestic animals as from their nature and habits are destructive to other property; any educational funds belonging to the State (except the endowment of and debt due to the University of Georgia); and such other sums of money as the legislature shall raise by taxation or otherwise for educational purposes, are hereby declared to be a common school fund.”

Georgia Constitution, Article VII, Section 13, Paragraph 1.—“The proceeds of the sale of the Western & Atlantic, Macon and Brunswick, or other railroads held by the State, and any other property owned by the State, whenever the general assembly may authorize the sale of the whole or any part thereof, shall be applied to the payment of the bonded debt of the State, and shall not be used for any other purpose whatever, so long as the State has any existing [fol. 312] bonded debt; provided, that the proceeds of the sale of the Western & Atlantic Railroad shall be applied to the payment of the bonds for which said railroad has been mortgaged, in preference to all other bonds.”

The Act of Georgia for the construction of the Western & Atlantic Railroad approved December 21, 1836, the material parts of which are:

“Sec. 1. A railroad communication as a State work, and with the funds of the State, shall be made from some point on the Tennessee line, near the Tennessee river, commencing at or near Rossville, in the most direct and practicable route, to some point on the southeastern bank of the Chattahoochee river, which shall be most eligible for the extension of branch railroads, thence to Athens, Madison, Milledgeville, Forsyth, and Columbus, and to any

other points which may be designated by the engineer or engineers, surveying the same, as most proper and practicable, and on which the legislature may have hereafter determined: Provided, that no greater sum than \$350,000 shall be appropriated, annually to the work contemplated by this act, unless a future legislature shall otherwise direct.

"Sec. II. A competent engineer shall be forthwith appointed by the governor, whose duty it shall be to make an accurate and instrumental examination, survey, and location of said road, and an estimate of the probable cost, which said engineer shall be authorized and empowered under the control and direction of the governor, to employ such assistants, surveyors and attendants as shall be necessary, speedily and effectually to accomplish such survey and location, and an estimate of the expenses thereof; and the salaries and expenses shall be paid out of the treasury of this State, for which purpose, the sum of \$60,000, be and the same is hereby appropriated and set apart.

[fol. 313] "Sec. III. So soon as a report of such survey and location and estimate shall have been made by the said engineer to the executive, if the same shall show the work to be practicable at a reasonable expense, a superintendent shall be appointed by the executive whose duty it shall be, to advertise for proposals for the *the* construction of said road, or such parts thereof, as shall be determined by said superintendent, under the advice of said engineer, to be first built. And on the receipt of satisfactory proposals, the said superintendent shall accept such of them as shall be most advantageous to the State, and shall insure the construction thereof, within a time to be allowed by the superintendent, and shall have authority to require such securities as shall be deemed necessary, to insure the faithful performance of the contracts;

"Sec. VI. The engineer and superintendent of the State shall have full power and authority to treat with any owner of land, or any executor, administrators, or guardian, having the legal custody and management thereof, through which said railroad may be cut or constructed, or from which any timber or other material may be taken for the construction of said railroad, and to fix and agree upon a compensation for the same.

And when said engineer and superintendent cannot agree with such owner so aggrieved (and in all cases where an executor, administrator, or guardian is concerned) the amount of injury or damage sustained, shall be in writing submitted to, and shall be adjudged and determined by three arbitrators, sworn to do justice between the State of Georgia and the party so aggrieved, one of whom shall be chosen by the said engineer and Supt. one by the other party and a third by the two so chosen, or in the even- of their disagreement, [fol. 314] in such choice, by any three or more of the justices of the inferior court of the county in which such land may lie, either in term time or vacation, all which submission, choice or appointment and award shall be reduced to writing, and no act bona fide of any

exe  
sha  
be  
she  
the  
oth  
wri  
the  
the  
pro  
spe  
issu  
by  
pre  
by  
lie,  
fied  
has  
in t  
of t  
req  
of t  
prai  
tion  
quen  
[fol  
Stat  
susp  
be c  
shal

"g  
Wes

"g  
bran  
the C  
ville  
as c  
bran  
been  
erno  
capit  
scrip  
vide  
subsc  
shall

An  
above  
whic

executor, administrator or guardian and in conformity with this act, shall in any manner prejudice, his, her, or their interest, but shall be binding on the heirs at law, legatees, or orphans with whom he, she, or they may have to account; and it shall and may be lawful for the said engineer or supt., for, and on behalf of the State, or for the other party to the award of said arbitrators to present to them a written declaration of dissatisfaction therewith, and desire to appeal therefrom, who shall thereupon transmit forthwith to the clerk of the superior court of the county wherein said land lie, all previous proceedings in the case, together with such appeal, to be tried by a special jury, as in other cases of appeal, without formal pleadings or issue; which said appeal shall be prosecuted on behalf of the State by the attorney or Sol. Genl., officiating in such court; and upon presentation to the governor of any such agreement or award, attested by a justice of the inferior court of the county wherein said land may lie, or of a verdict of a special jury in any such superior court, certified by the clerk thereof, whereby the payment of a sum of money has been accorded, awarded, found, or adjudged to any individual in the manner herein pointed out, together with a relinquishment of the land, if any were in dispute, it shall be his duty to make a requisition upon the fund herein before appropriated, in satisfaction of the claim so adjusted. In making the said valuation, the appraisers or the court (in case of appeal), shall take into consideration the loss or damage which may accrue to the owners in consequence of the land being taken or the right of way being obstructed; [fol. 315] provided, that no difference or disagreement between the State and any landholder shall operate by injunction or otherwise to suspend the progress of said work; but the same shall in all cases be continued without interruption, if such submission to said award shall be tendered by said superintendent and agent as aforesaid."

"Sec. IX. Said railroad shall be known and distinguished as the Western and Atlantic Railroad of the State of Georgia.

"Sec. X. (And for the encouragement of the construction of branch railroads from the terminus of the said State Railroad, on the Chattahoochee to the several towns of Athens, Madison, Milledgeville, Forsyth, and Columbus. Be it further enacted, That so soon as charters shall have been obtained for the construction of said branch railroads or any of them, and one half of the stock shall have been subscribed for, in all or either, it shall be the duty of the governor to subscribe in the name of the State, for one fourth of the capital stock of such company or companies; provided, that said subscriptions shall not exceed \$200,000 to any one branch; and provided also, that the State shall not be required to pay any part of said subscription until the whole capital stock of any such companies shall have been subscribed for;"

An act of Georgia approved December 23, 1837, amending the above mentioned act of December 21, 1836, the material parts of which are:



"Sec. 1. Be it enacted: That there shall be railroads constructed on the route surveyed, and located under the provisions of the act hereinbefore referred to, to the northwestern boundary of this State or to the Tennessee river, if the right of way can be procured on terms that may be deemed reasonable by the Governor of this State, and the commissioners hereinafter named.

[fol. 316] "Sec. II. For the general superintendence of said work, there shall be elected by the present session of the legislature three persons to act as commissioners (one of whom shall be the president of the board), whose duty it shall be, with the advice of the engineer in chief, to procure such officers and agents, and adopt such system, rules and regulations as may be deemed best conducive to insure the immediate, vigorous and successful prosecution of such work, and tend to economical expenditure, and the establishment of a strict accountability of the officers and agents employed, which rules and regulations shall be published for the information of all concerned.

Sec. III. The said commissioners shall have the same power and authority in procuring the right of way as the Supt. and engineer had under said act.

"Sec. IV. It shall be the duty of the president of said board to make quarterly returns to the governor of this State of the disbursements of the current quarter, accompanied by the necessary vouchers, the amount of work finished during the same period, and an accurate statement of the condition and progress of the road; which returns shall be published for the information of the people.

Sec. V. The said W. & A. R. R. shall continue from the southeastern bank of the Chattahoochee river to some point not exceeding eight miles, as shall be most eligible for the running of branch roads thence to Athens, Madison, Milledgeville, Forsyth, and Columbus, and that the same shall be surveyed and located by the engineer in chief, upon ground most suitable to answer the purpose herein expressed.

"Sec. VI. For the purpose of procuring the necessary funds for the accomplishment of said work, the said commissioners shall, conjointly with the governor of this State, from time to time, and in [fol. 317] such sums as to them may seem most expedient, sell or dispose of stock to be created on the credit of the State, bearing and interest of not more than six per centum per annum, scrip for which stock shall be issued and signed by the governor and the president, for the time being of said board of commissioners and the said stock shall not be redeemable in less time than thirty years after it is issued, and the interest thereon shall be paid from the interest on the discounted paper held by the Central Bank of this State; provided that nothing shall be herein so construed to authorize the commissioners and governor aforesaid to pledge the credit of the State for an amount not more than five hundred thousand dollars during any one year.

"S  
the p  
year,  
annu  
of du  
ensur  
their  
duties

"Se  
affix t  
issued

An  
above  
which

"Se  
R. of  
amina  
of said  
[fol. 3  
or pla  
condu  
the p  
the g  
said r  
tracts  
may c

"Se  
hereby  
engine  
of the  
engine  
can be

An  
above  
which

"Se  
R. of  
govern  
to the  
of suc  
vantag  
ceed si  
sum n  
the dat

"Se  
cated b

"Sec. VII. The three commissioners who shall be elected during the present session of the legislature, shall hold their office for one year, and the election for such board of commissioners shall be held annually, and shall be subject to removal by the governor for neglect of duty, and their vacancies shall be filled by the governor, until the ensuing session of the legislature, and shall, before entering upon their office, take and subscribe an oath faithfully to discharge the duties thereof.

"Sec. VIII. The Secretary of State be authorized and directed to affix the seal of this State to script or certificates of debt of this State, issued by the provisions of this act."

An act of Georgia approved December 29, 1838, amending the above mentioned act of December 21, 1836, the material parts of which are:

"Sec. I. Be it enacted that the commissioners of the W. & A. R. R. of the State of Ga., be authorized and required to make an examination of the country suitable for the northwestern termination of said road, and to have the route surveyed during the *the* ensuing [fol. 318] year, and thereupon to fix upon and determine the point or place for said termination, which in their opinion may be most conducive to the prosperity and advantage of the State; and unless the point so determined shall be disapproved by his excellency *by* the governor, it shall be held and considered the termination of said road, and they are hereby authorized to make any and all contracts touching the land where said road shall terminate, as they may conceive advantageous to the State.

"Sec. II. The commissioners of the W. & A. R. R. be and they are hereby required to discharge from the service of the State, all the engineers whose services are not absolutely necessary to the progress of the work on said road; and that they hereafter discharge said engineers, or any part of them, as their services on the W. & A. R. R. can be dispensed with."

An act of Georgia approved December 29, 1838, amending the above mentioned act of December 21, 1838, the material parts of which are:

"Sec. I. Be it enacted: That the commissioners of the W. & A. R. R. of the State of Ga., with the concurrence of his excellency the governor, are authorized to sell scrip, on certificates of State debt, of the amount of one million and a half dollars, to make said scrip of such size, form and denomination as they may deem most advantageous to the State; provided, the rate of interest does not exceed six per cent per annum, and the reimbursement of the principal may not be required within a term of 30 (thirty) years after the date of sale.

"Sec. II. Said scrip or certificates of State debt, shall be authenticated by the signature of the governor, and of the president of the

board of commissioners, and by such seal or stamp as may be directed by an act passed at this session of the Gen'l Assembly.

[fol. 319] "Sec. III. The faith of the State of Georgia, is hereby solemnly pledged for the redemption of the entire debts principal and interest, that may be incurred by the sale of said scrip, and that for the purpose of insuring the punctual payment of the interest falling due on said script, the income dividends and profits of every description, arising from the funds, which the State holds in the Central Bank of Georgia, and from all other bank stock belonging to the State, are hereby set apart and vested in said commissioners, except such as have heretofore been appropriated to Franklin College and county academies, and the general fund for common schools.

"Sec. IV. Said board shall report to the general assembly, during the first week of each session, a full account of the actings and doings of said board in relation to all its fiscal transactions, the condition and progress of the road; and also furnish estimates, plans, and all other information touching that branch of the public service, which it may be deemed proper to lay before the legislature.

"Sec. V. Said board shall apply the funds thus placed at their disposal, to the completion of the W. & A. R. R. and such other work therewith connected as the general assembly may direct, embracing every matter of expenditure on surveys, grades, rails, locomotives, vehicles, apparatus, concessions of way, officers and agencies, and shall make such periodical reports of its proceedings as may have been, or may hereafter be required by law.

"Sec. VI. The agent or commissioner, who shall procure the funds from the sale of said scrip, shall deposit the same in the Central Bank, subject to the order of the commissioners or the president thereof, to be applied as herein contemplated.

"Sec. VII. It shall be the duty of said board to direct the location [fol. 320] of any part of said road which may not, at this time be under contract, to adopt and use any devices, plans and improvements in the location, structure and equipment of said work, which may in their judgment conduct most extensively to the general interests of the people of Ga.

"Sec. VIII. Said board of commissioners, should funds be needed before a sale of script can be effected, shall have authority to draw the same by the requisition of the president from the Central Bank, or procure them elsewhere on temporary loan, as the one step or the other may seem most expedient in reference to the progress of the work or economy of expenditure, and for this purpose, said board are authorized to make a temporary pledge of said script, or certificates of State debt."

An act of Georgia, approved December 21, 1839, amending the above mentioned act of December 21, 1833, the material parts of which are:

"Sec. I. Be it enacted that should the commissioners of the W. & A. R. R. deem it advisabale to issue and dispose of the scrips or certificates of State debt, authorized by the above recited act, in payment of contractors engaged, or that may hereafter be engaged in the construction of said road, or to defray expenses incident to said work, they shall have full power and authority to make such scrip payable at any period of time, not less than thirty years from the date of such scrip, or time of its sale and delivery: Provided, that not more than three hundred thousand dollars thereof, shall be made payable in any one year, and provided also, that the said scrip or certificates of State debt shall not be disposed of at a rate less than its par value.

"Sec. II. For the purchase of iron or other material or appurtenance when the same shall become necessary for the completion of [fol. 321] said railroad, agreeably to the provisions of the above recited act, it shall and may be lawful for the commissioners aforesaid to issue and dispose of scrip or certificates of State debt, agreeably to the provisions of the above recited act, in payment for such iron or other material or appurtenances."

An act of Georgia approved December 21, 1839, amending the above mentioned act of December 21, 1836, the material parts of which are:

Sec. I. Be it enacted that from and after the passage of this act in all cases where there has been a previous agreement between said commissioners, or their agents, and the owner or owners of lands through which said road runs as to the amount of damage done the same, by reason of said road, or where there has been a previous assessment of said damage, according to the provisions of the statute in such case made, and it shall appear that said agreement or assessment was made in reference to and including only the damage to be sustained within certain definite limits, or a specific width, and since the grading of the said road, a greater amount of damages have been sustained than was estimated in said agreement or assessment, by reason of more land being required for the construction of the same than what was embraced in such specific limits or width, or by reason of the throwing out of waste dirt, &c., it shall be the duty of said commissioners to pay to such owner or owners the amount of such extra damage, to be ascertained and estimated in the same way as is now by law directed and pointed out for the estimation and assessment of damages done to lands by the said railroad; provided that in no case of assessment of damage under this act, shall any but the said extra damages be taken into the estimation."

An act of Georgia approved December 24, 1840, amending the above mentioned act of December 21, 1836, the material part of [fol. 322] which are:

"Sec. I. Be it enacted that from and immediately after the passage of this act, that the three commissioners of the W. & A. R. R. one

or another shall be at all times on the road, personally superintending the works, and supervising the engineers and contractors, and all other persons employed on said road in any capacity whatever."

An act of Georgia approved December 4, 1841, amending the above [fol. 323] mentioned act of December 21, 1836, parts of which are:

Sec. II. So much of an act assented to twenty third day of December, 1837, as relates to the election of three commissioners for the W. & A. R. R. be, and the same is hereby repealed; and that the governor be authorized to appoint a chief engineer and assistants, and a disbursing agent, and to give them such compensation per annum as he may deem proper, having a due regard to the nature of their service and strictest economy; said disbursing agent shall be required to give such bond, payable to his excellency, the governor, and enter into such other rules and regulations as may be required by the governor to insure the faithful performance of his duties, who shall continue in office until all existing contracts are liquidated and settled, and no longer.

Sec. III. The duties hitherto discharged and the powers hitherto exercised by the board of commissioners, be hereafter discharged and exercised by said chief engineer, and disbursing agent, jointly, subject to the decision of his excellency the governor in case of disagreement, and that in all cases where the signature of the commissioners, or president of the board of commissioners, is authorized or required by laws or regulations now of force, the signature of the disbursing agent shall hereafter be substituted therefor, and be in all respects equivalent thereto.

"Sec. IV. It shall be the duty of the present board of commissioners of said road to turn over to said disbursing agent, the books, vouchers, records, scrip, State bonds and all other papers and funds belonging to, connected with, or appertaining to said road, in their hands or under their authority, a schedule of which shall be made, and a copy thereof deposited in the executive office, and the original retained by said agent.

[fol. 324] "Sec. V. It shall be the duty of the governor to appoint an engineer, who shall receive a reasonable compensation for his services, to admeasure all work done on said road between the Etowah river and Ross' landing, and said engineer is hereby authorized to annul and rescind, with the consent of the contractors, all contracts for unfinished work on said road; and said engineer shall make a full and final estimate of all work done under said rescinded contracts, and if all or any of said contractors refuse or neglect to accept this offer, they shall be held strictly subject to their original contracts, on which no extension of time or indulgence shall be given."

An act of Georgia approved December 19, 1842, amending the above mentioned act of December 21, 1836, to wit:

Sec. I. That the tenth section of the above recited act, which was assented to December 21st, 1836, be, and the same is hereby repealed; provided, nothing herein contained shall be so construed as to prevent the State from complying on her part, with any contract which she may have already entered into with any railroad company which has in good faith complied on its part with the contract.

An act of Ga. approved December 22, 1843, amending the above mentioned act of December 21, 1836, the material parts of which are:

"Sec. I. Be it enacted that the first section of an act entitled an act to suspend operations on a part of the W. & A. R. R. and to provide for the execution of contracts on a part of the same, and for the execution of contracts on a part of the same, and for the other purposes therein specified, assented to Dec. 4th, 1841, be and the same is hereby repealed.

"Sec. II. The powers and authority which have heretofore been vested in the commissioners of the W. & A. R. R. or in the governor [fol. 325] and commissioners, or in the chief engineer and disbursing agent, or in the governor and chief engineer, be vested in the governor and chief engineer of said road; and where the signature of either of the above named officers is authorized or required by laws or regulations heretofore of force, the signature of the governor and chief engineer shall hereafter be substituted therefor, and be in all respects equivalent thereto.

"Sec. III. It shall be the duty of the chief engineer, under the direction of the governor, to progress gradually in the completion of the said W. & A. R. R., with the existing appropriation when the same can be economically expended, and whenever either of the branch roads shall make a junction with the said W. & A. R. R. at its southeastern terminus, to apply such motive power as may be adapted to its wants and to establish rates of transportation for persons and produce, without discrimination as to the destination of either."

An act of Ga., approved December 24, 1845, amending the above mentioned act of December 21, 1836, the material parts of which are:

Sec. I. Be it enacted, that the profits only of the W. & A. R. R. after defraying the expenses of repairs and transportation shall be applied by the chief engineer, with the consent of the governor, to the extension of said road as far as Cross Plains in the county of Murry (and no further), within the ensuing two years, provided if the profits of the road will allow a further extension, his excellency the governor is authorized to use said profits to such extension.

Sec. II. If the profits of the road should be insufficient to complete the said road to Cross Plains, and to equip the same for use

within two years, it shall and may be lawful for the governor to issue bonds, signed by himself and countersigned by the chief engineer, [fol. 326] payable within ten years after date, and bearing an interest of six per cent per annum, payable annually for such sum, not exceeding sixty-five thousand dollars annually, as may suffice for such extension and equipment, and dispose of the same for at least their nominal value, to be applied to the purpose hereinbefore indicated. And the said W. & A. R. R. shall be pledged for the payment of said bonds and the net profits thereof applied exclusively to the payment of the principal and interest thereof, but the State shall be no further bound therefor, and such limited liability shall be clearly expressed in said bonds. And in case said bonds or any of them shall be unpaid at maturity, the chief engineer shall be considered as a trustee in possession, for the use of the holders of said bonds and may be held to account by them in the superior court of the county of his residence, for the profits of said road. Provided, said bonds shall not be paid until the profits of said road be sufficient to pay them."

An Act of Ga. approved December 26, 1845, amending the above mentioned act of December 21, 1836, the material parts of which are:

Sec. I. Be it enacted, that if any person or persons will wilfully and maliciously destroy, or in any manner damage, injure, or obstruct, or shall wilfully and maliciously cause or aid and assist, or counsel or advise any person or persons to destroy, or in any other manner to damage or injure, or obstruct the W. & A. R. R. or any bridge, edifice, right, or privilege constructed for the use of said road, or if any person or persons shall, without authority, turn, move, or in any manner interfere or meddle with any fate, switch, siding, or other appurtenance to said road, such person so offending shall be guilty of a misdemeanor, and on conviction thereof, shall be imprisoned at hard labor in penitentiary for a term of years not less [fol. 327] than seven nor more than ten; and if death to any passenger or other person on said road shall ensue from any such act, such act or offense shall be held and deemed to be murder, and shall be punished accordingly."

An act of Ga., approved December 27, 1845, amending the above mentioned act of December 21, 1836, the material parts of which are:

"Sec. I. Be it enacted that immediately after the passage of this act his excellency the Governor shall appoint such agents as in his opinion may be necessary to manage and superintend the business of transportation on the W. & A. R. R., to be paid a reasonable compensation for their services, to be fixed by his excellency, and which shall be paid out of the money raised on said road.

"Sec. V. The several agents appointed by virtue of this act shall make quarterly returns to his excellency the Governor, of the amount of money received by them, and shall pay over the same as directed by the Governor."



An act of Ga. approved December 30, 1847, amending the above mentioned act of Dec. 21, 1836, the material parts of which are:

"Sec. II. It shall and may be lawful for his excellency the Governor and Chief Engineer to receive proposals for the completion of the W. & A. R. R. from Dalton to Chattanooga, payable in the bonds of said State, issued under the authority of an act passed by the present general assembly; provided always that no contract for the completion of the road shall exceed the amount of three hundred and seventy five thousand dollars, nor shall anything in this act be construed so as to prevent payments being made in said bonds for work and materials for the completion of said road, whenever contractors may prefer the bonds to cash.

"Sec. III. His Excellency, the Governor, with the concurrence of [fol. 328] the Chief Engineer be, and he is hereby authorized should he deem the interest of the State to require it, to make a contract with any person or persons for the completion of said road and all necessary depots, provided the same can be done for the sum of three hundred and seventy five thousand dollars, or less, payable in bonds of the State, said contract to be made upon such terms and restrictions, and upon such security as the Governor shall prescribe, and to be completed by the next general assembly."

An act of Ga. approved December 23, 1847, amending the above mentioned act of December 21, 1836, the material parts of which are:

"Be it enacted that it shall be the duty of the Governor to have completed at the earliest practicable day, the W. & A. R. R. and that he cause the same to be equipped and used to the best advantage through its entire length from Atlanta to Chattanooga.

Sec. II. To raise funds for these objects, the governor shall issue the bonds of the State of Ga. in sums of five hundred dollars each, to the amount of three hundred and seventy-five thousand dollars, the bonds so issued shall bear an interest of six per centum per annum, payable semi-annually. The said bonds shall be divided into three classes, and the principal of the first class shall be payable five years after the date thereof, and of the second class fifteen years after their date, and of the third class twenty years after their date, but the two last classes of the said bonds shall be redeemable by the State, at any time after the expiration of ten years from their date, and shall be so expressed. The interest and principal of the said bonds shall be made payable at such place and places as his Excellency the Governor may deem most advisable, and best calculated to promote the objects of this act.

[fol. 329] "Sec. III. It shall be the duty of the governor to sign and dispose of the said bonds at the time and in the manner best adapted to accomplish the completion of the road; provided, that said bonds shall not be negotiated for less than their par value, or paid out for work, materials, cars, engines; or for any other necessary equipment of the road of any kind or description whatever.

"Sec. V. The proceeds of said road, after deducting the expense, of repairs, running said road, and keeping up the necessary equipments, and all other expenditures necessary to its proper management, and after the payment annually of all interest on debts heretofore contracted by authority of the general assembly and which constitute lines upon the said road and its income, shall be paid into the treasury of the State by the chief engineer, and be applied to the payment of the interest due on the bonds authorized by this act, and the surplus of said receipts shall form a sinking fund for the redemption of the bonds heretofore issued and which form a lien upon the said road, and of the bonds to be issued by authority of this act, at their maturity."

An act of Ga. approved Feby. 23, 1850, amending the above mentioned act of December 21, 1836, the material parts of which are, "Be it enacted. That from and after the passage of this act, that so much of the act of 1843, as authorizes the governor to sell said railroad, be and the same is hereby repealed."

An act of Ga., approved Feby. 11, 1850, amending the above mentioned act of December 21, 1836, the material parts of which are:

"Sec. I. Be it enacted, that the chief engineer of the W. & A. R. R. be authorized and directed to have constructed a turnout on the W. & A. R. R. in the county of Cass, at such place near the [fol. 330] Etowah river as Messrs. Stovall and Lother shall designate: Provided the said Stovall and Lother shall pay all expenses incurred in making said turnout and load all cars loaded at said turnout by them at their own expense, and take receipts for the freight from the agent at the next depot below said turnout."

An act of Ga. approved Feby. 23, 1850, amending the above mentioned act of Dec. 21, 1836, the material parts of which are:

"Sec. VI. The Governor shall not sell at any time any part of the right of way heretofore acquired by the State, nor any property or land that may be necessary now, or at any other time, for the erection of depots, wood yards, or water stations, or for any other improvement necessary or convenient to said road."

Code of 1911 of Ga., paragraph 1332:

"The Governor or superintendent shall not sell any part of the right of way, nor any property or land of the road, that may be necessary for the erection of depots, wood-yards, water stations or for any other improvement to the convenience or interest of said road; but they may sell any land of the road, if of no use to it, in the manner iron is sold advertising it in a public gazette at Atlanta, and in the county where it lies, and in a public gazette thereof, if one, and the superintendent shall execute deeds thereto in his official capacity."

An act of Ga. approved Feby. 8, 1850, amending the above mentioned act of December 21, 1836, the material parts of which are:

"Sec. I. That the Governor be authorized to dispose of such lands lying on the line of the W. & A. R. R. as he may deem expedient by public sale.

"Sec. II. The moneys arising from the sale of the lands aforesaid, may be applied to any of the purposes of the Western & Atlantic [fol. 331] R. R. or placed in the State treasury, to be used in defraying the expenses of the State government, which ever may be deemed most expedient."

An act of Ga. approved January 15, 1852, amending the above mentioned act of December 21, 1836, the material parts of which are:

"Sec. I. From and after the passage of this act the W. & A. R. R. shall be governed and its business conducted in accordance with provisions of this act, hereinafter contained.

"Sec. II. It shall be the duty of the governor of this State to appoint an officer, who shall be styled the Superintendent of the W. & A. R. R., and who shall hold his office until the first of January, 1854, or until a successor is qualified. This officer may be removed by the governor at any time during the term of his appointment, and may be reappointed from term to term. He shall also give bond and security, to be approved by the governor, in the sum of twenty thousand dollars, for the faithful discharge of the duties of his office.

"Sec. III. It shall be the duty of the superintendent of the W. & A. R. R. to conduct all the operations of the road connected with its construction, equipment and management. He shall appoint all the subordinate officers of said road, who shall be responsible to him, but those appointments shall be subject to the approval of the governor. He shall have power to remove said officers, and to reappoint others in their stead. It shall be his duty, by and with the consent of the governor, to establish rates of freight and passage, and to make all necessary arrangements respecting such rates with other roads. He shall also contract for and purchase machinery, cars, materials, work shops, and all other things necessary and proper for the construction, repair and equipment of the road and [fol. 332] its general working and business; but all contracts and expenditures which exceed the sum of five thousand dollars, shall be subject to the approval of the governor. He shall also have power, by and with the consent of the governor, to make contracts with the Government of the United States for the transportation of mails over the said road, and to arrange schedules for running trains at such times, either by day or night, as they may deem expedient. He shall also have power, with the approval of the governor, to settle all claims against the W. & A. R. R. and should any dispute arise concerning any claim which cannot be amicably settled, the claimant shall be authorized to bring suits in any of the superior courts of the several counties of this State through which the said road passes, against the superintendent of the W. & A. R. R. in his official character, the judgment which may be obtained, shall be against the said

superintendent in his official character, and shall be satisfied by him from the assets of said road, but shall not bind his person or individual property. The said superintendent shall also have power to sue officially for any claim due the State on account of the said road.

"It shall be the duty of the superintendent to make all necessary rules and regulations for the proper conduct of the business of the road, and the enforcement of discipline and subordination, and he may impose penalties for a violation of said rules and for breaches of duty by all persons in the employment of the said road.

"It shall also be the duty of the superintendent to appoint all necessary accountants and clerks to perform the proper office duties pertaining to the business of the road, and he shall see that the books and accounts of the road shall be so kept, at all times, to show accurately the condition of its fiscal affairs.

[fol. 333] "All disbursements made on account of said road shall be by warrant of the superintendent, drawn upon the treasurer; or vouchers approved by the superintendent and countersigned by the auditor.

"It shall also be the duty of the superintendent to have settlements with all agents of the said road for all money received by them, as promptly as may be practicable, and any agent neglecting or refusing to make a settlement when required, shall be discharged. It shall also be the duty of the superintendent to make out and transmit to the governor a quarterly statement, exhibiting the transactions of the road, its receipts and expenditures, which shall be published in one or more of the public gazettes at the seat of government."

An act of the State of Tennessee passed January 24th, 1838, to wit:

"An Act to Authorize the State of Ga. to Extend Her W. & A. R. R. from the Georgia Line to Some Point on the Eastern Margin of the Tennessee River.

"Sec. I. Be it enacted by the general assembly of the State of Tennessee, that the State of Georgia shall be allowed the privilege of making every necessary recognizance and survey for the purpose of ascertaining the most eligible route for the extension of her W. & A. R. R. from the Georgia line to some point on the eastern margin of the Tenn. River.

"Sec. II. And be it further enacted, that as soon as said route and point shall be ascertained, the State of Georgia, shall be allowed the right of way from the extension and construction of her said railroad, from the Georgia line to the Tennessee river, and that she shall be entitled to all privileges, rights and immunities (except the subscription on the part of Tennessee), and be subject to the same re-[fol. 334] strictions, as far as they are applicable, as are granted, made and prescribed for the benefit, government and direction of the Hiawassee Railroad Company.

"Sec. III. And be it further enacted, that the foregoing rights and privileges are conferred upon the State of Ga. on condition that whenever application is made, she will grant and concede similar ones, and to as great an extent to the State of Tennessee or her incorporated companies."

An act of the State of Tennessee passed October 18, 1847, to wit:

"An Act Giving Further Time for the Completion of the W. & A. R. R. of Georgia to the Tennessee River

Be it enacted by General Assembly of the State of Tennessee, that the further time of two years, from the first day of Jany., next, be given to the State of Georgia, to complete the W. & A. R. R. of that State, to Chattanooga on the Tennessee River."

An act of the State of Tennessee passed Feby. 3, 1848, to wit:

"An Act Conferring Upon the State of Georgia Additional Rights in Relation to the W. & A. R. R.

"Be it enacted by the general assembly of the State of Tennessee that all the rights, privileges and immunities, with the same restrictions which are given and granted to the Nashville and Chattanooga R. R. Company, by the act of the general assembly of the State, incorporating said company passed December 11th, 1845, are, so far as they are applicable, hereby given to and conferred upon the State of Georgia, to be enjoyed and exercised by that State in the construction of that part of the W. & A. R. R. lying in Hamilton county, Tennessee, and in the management of its business."

An act of the State of Tennessee, incorporating the Nashville and [fol. 335] Chattanooga Railroad Company, the material portions of which are:

"Sec. 21. The said company may purchase, have and hold in fee, or for a term of years any lands, tenements or hereditaments which may be necessary for said road or appurtenances thereof, or for the erection of depositories, storehouse, houses for the officers, servants or agents of the company, or for work shops or foundries to be used for the said company, or for procuring timber, stones or other materials necessary for the construction of the road or its appurtenances, or for effecting transportation thereon.

"Sec. 22. The said company shall have the right, then necessary, to construct the said road, or any branch thereof, across or along any public road or water course, provided that the said road, and the navigation of such water course shall not be thereby obstructed; and provided further that such railroad shall not be located so near any turnpike road as to injure or prejudice the interests of the stockholders in such turnpike road, except upon such terms as may be agreed

upon by the president and directors of the same on behalf of the stockholders.

"Sec. 24. Where any lands or right of way may be required by the said company for the purpose of constructing their road, and for want of agreement as to the value thereof, or from any other cause, the same cannot be purchased from the owner or owners, the same to be taken at a valuation to be made by five commissioners or a majority of them, to be appointed by the circuit court of the county where some part of the land or right of way is situated, and the said commissioners, before they act, shall severally take an oath before some justice of the peace, faithfully and impartially to discharge the duty assigned them. In making the said valuation, the commissioners shall take into consideration the loss or damage which may [fol. 336] occur to the owner or owners in consequence of the land being taken or the right of way surrendered, and also the benefit and advantage he, she or they may receive from the erection or establishment of the railroad or works, and shall state particularly the nature and amount of each and the excess of loss and over and above the benefit and advantage shall form the measure of valuation of the said land or right of way.

"The proceedings of the said commissioners, accompanied with a full description of the said land or right of way, shall be returned, under the hands and seals of a majority of the commissioners, to the court from which the commission issued, thereto remain of record. In case either party to the proceedings shall appeal from the valuation to the next session of the court granting the commission, and give reasonable notice to the opposite party, of such appeal, the court shall order a new valuation to be made by a jury who shall be charged therewith in the same terms or as soon as practicable and their verdict shall be final and conclusive between the parties, unless a new trial shall be granted, and the lands or right of way, so valued by the commissioners or jury, shall vest in the said company in fee simple, so soon as the valuation may be paid, or when refused, may be tendered. Where there may be an appeal, as aforesaid, from the valuation of commissioners by either of the parties, the same shall not prevent the works intending to be constructed from proceeding, but where the appeal is by the company requiring the surrender, they shall be at liberty to proceed in their works only on condition of giving to the opposite party a bond, with good security, to be approved of by the clerk of the court, where the valuation is returned, in a penalty equal to double the said valuation, condition- for the payment of said valuation and interest, in case the same be sustained; [fol. 337] and in case it be reversed, for the payment of the valuation thereafter to be made by the jury and confirmed by the court; provided, that when the land cannot be had by gift or purchase, the operations of the work are not to be hindered or delayed during the pendency, of any proceedings to assess its value as aforesaid nor shall any injunction or supersedeas be awarded by any judge or court to delay the progress of said work.

"Sec. 25. In the absence of any contract with the said company in relation to lands through which the said road may pass, signed by the owner thereof, or by his agent, or any claimant or person in possession thereof, which may be confirmed by the owner, it shall be presumed that the land upon which the said road may be constructed, together with a space of one hundred feet on each side of the center of said road, has been granted to the company by the owner thereof, and the said company shall have good right and title thereto, and shall have, hold and enjoy the same as long as the same be used only for the purpose of the road, and no longer, unless the person or persons owning the said land at the time that part of the road, which may be on said land, was finished, or those claiming under him, her or them, shall apply for an assessment for the value of the said lands, as hereinbefore directed within five years next after that part of said road was finished. And in case the said owners or owner, or those claiming under him, her to them, shall not apply for such assessment within five years next after the said part was finished, he, she or they shall be forever barred from recovering the said land, or having any assessment or compensation therefor; provided, nothing herein contained shall affect the right of females covert or infants until two years after the removal of their disabilities."

An act of the State of Tennessee entitled "An act to incorporate [fol. 338] the Hiawassee Railroad Company," the material portions of which are:

"Sec. I. Be it enacted by the general assembly of the State of Tennessee, that William Park et al. be and are hereby appointed commissioners, under a direction of a majority of whom subscriptions may be received to the capital stock of the Hiawassee Railroad Company, hereby incorporated, which commissioners, together with such other persons as now are, or may hereafter become associated with them, their successors and assigns, shall constitute a body corporate, and they are hereby incorporated under the name aforesaid, and in that name they shall have perpetual succession, may sue and be sued, plead and be impleaded, and shall possess and enjoy all the rights, privileges, and immunities, with power to make such by-laws, ordinances rules and regulations, not inconsistent with the laws of this State and the United States, as shall be necessary to the well ordering and conducting the affairs of said company; and may by their by-laws, declare vacant the place of any director for non-attendance or neglect of duty; and the said company shall be capable in law of purchasing, accepting, selling, leasing and conveying estates, real, personal and mixed, to the end and for the purpose of facilitating the intercourse and transportation from Knoxville, East Tennessee, through the Hiawassee district to a point on the Southern boundary of Tennessee, to be designated by the commissioners hereinafter mentioned as the most practical route to intersect the contemplated railroad from Augusta to Memphis.



"Sec. 13. Be it enacted, That the president and directors of said company shall be, and they are, hereby vested with all the powers and rights necessary for the building, constructing and keeping in repair of a railroad from Knoxville, East Tennessee, through the Hiawasse district, to a point on the southern boundary of Tennessee, on the nearest, best and most practicable route.

"The said road shall have as many tracks as may be deemed necessary by the board of directors, but shall not be more than two hundred feet wide, to which width the company may purchase and cause the same to be condemned for the use of said road, or any less breadth, at the discretion of the directory, and they may be caused to be made, contract with others for making of said road, or any part thereof, and they or their agents, or those with them they may contract for making any part of said road may enter upon, use, excavate any land which may be laid out for the site of said road, or the erection of warehouses, engines, arbors, reservations, booths, stables, offices and mechanics' shops or other works necessary or useful in the construction or repair thereof or of its works.

"They may fix scales and weights, build bridges, lay rails, make embankments and excavations, and may use any earth, ground, rock, timber or materials which may be wanted for the construction and repair of any part of said road, and may construct and may acquire all necessary steam engines, cars, wagons, and carriages for transportation on said road by *house* or steam power, and all necessary apparatus appertaining to the same.

"Sec. 14. Be it enacted, that whenever it shall become necessary after said road is laid out, to subject the land of individuals over which said road is laid out to the use of said company, and if the right of soil of the owner can not be had by gift or purchase, it shall be lawful for the president and directors, their agents, contractors, laborers and servants to enter upon such lands and proceed in the opening and constructing of said railroad through the same; the pendency of any proceeding in any court, or before arbitrators, assessors or valuers, to estimate the damages that will be sustained [fol. 340] by the owner or proprietor of said land by reason of opening of said road shall in no manner hinder or delay the progress of said work, and no order shall be made, nor any injunction or supersedeas be awarded by any judge or court to hinder or delay the progress of said work, the true intent of this act being that all injury that may be done to any land without the consent of the owners or proprietors thereof, by opening or constructing the railroad through the same, over and above the advantages of the road to the owners or proprietors of the lands, shall be fully and completely compensated for damages when ascertained so that a work of great public utility may not be delayed by lawsuits.

"Sec. 15. Be it enacted, that the president and directors of said company, their officers, servants and agents, shall have full power and authority to enter upon all lands and tenements through which they may judge it necessary to make said road and lay out the same

according to their pleasure, so that neither the dwelling house, yard, garden, nor curtilage be invaded without consent of the owner thereof, and if the company can not agree as to the value of the land, and the owner will not convey it in fee, either party may apply to the circuit court of the county where the said land lies by giving five days' notice, if the owner of the land resides in the county, and twenty days' notice if he resides in any other county in this State, and by advertising in some newspaper printed in Knoxville, Athens or Madisonville, if he resides out of the State, or be a body corporate, to appoint commissioners to assess the value and condemn the land for the use of said road, and the court shall appoint five disinterested freeholders, of said county and who shall be sworn or *arrimed* justly and impartially to value the lands, who shall ascertain what damage the owner will sustain, if any, by the location of said road over his land, always taking into consideration the benefit the road may be [fol. 341] of to the owner, and the tendency said road will have to enhance the value of the land, and said five freeholders, any three of them concurring, shall report to said court as soon as practicable the damages, if any, and if none are sustained they shall report the fact, which report, if unexcepted to, shall be recorded and if any damages are assessed, the money shall be paid into the county court by the company. The fee simple of land so valued as aforesaid, shall vest in said company, and the description of the land and the report of the commissioners shall be made a matter of record, and when registered shall have the effect of a deed of conveyance in fee simple to the company; provided, however, that when infants or persons of non compos are owners of the land, the guardian shall be notified of said proceedings in said court, and if there be no regular guardian, said court shall appoint some person well qualified to defend and protect the interests of said infant or non-sane person.

"Sec. 16. Be it enacted, that the president and directors, for the purpose of making said road or repairing the same after it shall have been made, shall be at liberty by themselves or agents, to enter upon any adjacent land, and cut, quarry, dig, take and carry away therefrom any timber, stone, gravel, or earth which may be necessary, provided they shall not, without the consent of the owner, cut down any fruit trees or trees preserved in any enclosure for shade or ornament, or take away any materials constituting any part of the fence for building, for all of which materials, under the authority of this act and for all incidental injuries done to ground, wood, enclosure or crops in carrying them away, the said company shall make the owner a reasonable compensation; and if the parties cannot agree upon the price, it shall be ascertained by three impartial freeholders to be appointed by a justice of the peace at the application of either [fol. 342] party, the opposite party having three days' notice of the application — the justice. The three freeholders shall be sworn to do impartial justice between the parties, their award shall be returned to the justice and shall stand as an award made by order of the court upon the rights of the parties, upon which the justice may enter judgment and issue execution if within his jurisdiction; if

over, he shall certify the proceedings as in any other case to the next court to be proceeded up- as an award made by order of said court, provided, either party may have the proceedings corrected by certiorari and not by appeal; if the proceedings be quashed, the court may appoint other valuers and cause justice to be done as contemplated before and by order of the court quashing said proceedings.

"Sec. 17. Be it enacted, that should said railroad pass over vacant or unappropriated lands, said company shall have exclusive right of entering the land over which said road may be laid out, not exceeding two hundred feet in breadth, until the first day of January, 1839, and the entry taker of the district or county through which said road may be laid out shall not receive any entry within that period for the benefit of any other person or persons than said company under the penalty of five thousand dollars, to be recovered by action of debt in any court having cognizance thereof at the suit of said corporation, provided, said company shall notify the entry takers of the different counties through which said road may pass of the route thereof.

"Sec. 18. Be it enacted, That said railroad company shall have power to acquire and own, as common stock of said company, lands near and connected with said road, on which to erect warehouses, booths arbors, stables, reservoirs, etc., for the purpose of constructing [fol. 343] said road and keeping it in repair, and for the convenience of transportation and places of deposit, which improvements they are hereby authorized to construct. If the company cannot agree with the owners of the land necessary for the above purposes, they may have it condemned in the same manner as the land over which the road is laid out may be condemned by the 15th section of this act; provided, that no more than five acres shall be taken at any one place, except by agreement with the owners.

"Sec. 20. Be it enacted, that whenever it shall become necessary in the construction of said road to cross or intersect any public road now or hereafter established by law. It shall be the duty of said company so to construct said road as not to impede the passage or transportation of persons or property along the same.

"Sec. 21. Be it enacted that — it shall be necessary to pass through the improved land of any individual, it shall be the duty of said company to provide such individual with a proper and suitable wagonway across said road from one part of his or her land to the other if the same shall be required by said owner at the time and route of said railroad (is) determined on; but the owner of said road may at any time after said road shall be opened and completed construct and make such wagonway across the same at his or her own expense, under the supervision and direction of said company."

An act of the general assembly of Georgia, approved Oct. 24, 1870, entitled "An act to authorize the lease of the W. & A. R. R. and for other purposes therein mentioned," the material portions of which and the portion to which plaintiffs called attention being:

"  
len  
[fol  
toge  
pur  
T  
R. 1  
lock  
R. C  
"  
of th  
gene  
W. C  
here  
the  
toge  
app  
from

A  
titled  
fine  
othe  
act a

"S  
of th  
the S  
toget  
appu  
pora  
secu  
and  
lease  
visio  
[fol.  
dolla  
for a  
for a  
thous  
treas

Th  
St. L  
and l  
mate

"W  
State  
State

"Sec. 1. The general assembly of Georgia do enact that his excellency the governor of this State, be, and he is hereby authorized to [fol. 344] lease the W. & A. R. R. which is the property of the State, together with all its houses, work shops, depots, rolling stock and appurtenances of every character."

The lease of the W. & A. R. R. by the State of Ga. to the W. & A. R. R. Company dated December 27, 1870, signed by Rufus B. Bullock for the State of Ga., and by Jos. E. Brown, for the W. & A. R. R. Company, the material portion of which is:

"I, Rufus B. Bullock, governor of the State of Georgia, by virtue of the power and authority vested in me by the aforesaid act of the general assembly of Ga. do hereby grant, convey and lease to the W. & A. R. R. Company, composed — the persons whose names are herein given, and to their successors, representatives, heirs or assigns, the said W. & A. R. R., which is the property of the State of Ga., together with all the houses, work shops, depots, rolling stocks and appurtenances of every character, for the full term of twenty years from this date."

An act of the State of Ga. approved November 12th, 1889, entitled "An act to provide for the lease of the W. & A. R. R. to define the rights, powers, liabilities and duty of the lessee, and for other purposes therewith connected." The material portions of this act are:

"Sec. I. Be it enacted by the senate and house of representatives of the State of Ga., in general assembly met, that the governor of the State, be and he is hereby authorized to lease the W. & A. R. R. together with all its houses, workshops, rolling stock, depots and appurtenances of every kind and character to a company or corporation or to any party or parties who shall give good and sufficient security, as hereinafter provided for. The said lease to take effect and become operative from and after the expiration of the present lease, upon the following terms and according to the following provisions. The said lease to be for a term of not less than twenty [fol. 345] years, and for a sum of not less than thirty five thousand dollars per month or, for a term of not less than thirty years, and for a sum of not less than forty thousand dollars per month. Or, for a term of fifty years, and for a sum of not less than forty five thousand dollars per month, the rental to be paid monthly into the treasury of the State for the use of the State."

The lease by the State of Ga., dated July 18, 1890, to the N. C. & St. L. Ry., signed by Jno. B. Gordon, governor for the State of Ga., and by J. W. Thomas, as president for the N. C. & St. L. Ry., the material portion of which is:

"Whereas the undersigned, John B. Gordon, governor of said State in strict compliance with the act of the general assembly of said State, made an advertisement which was a definite proposal for bids,

as authorized by the said act, for the lease of the said W. & A. R. R. together with all its houses, work shops, rolling stock, depots and appurtenances of every kind and character, being the property of said State."

And the following language:

"Now this indenture witnesseth that said party of the first part (the State of Ga.) does hereby lease to the party of the second part, viz. to the Nashville, Chattanooga & St. Louis Ry., the said W. & A. R. R. a railroad running from City of Atlanta, in State of Ga. to the City of Chattanooga, in the State of Tenn., together with all its houses, work shops, rolling stock, depots and appurtenances of every kind and character, being the property of the State of Ga., and which the said act authorized the governor of said State to lease, under the provisions thereof for a term of twenty-nine (29) years beginning from and immediately after the termination of the lease contract now existing (which was executed on the 27th day of December, 1870, and ends twenty years from that date)."

[fol. 346] The acts of Ga., approved November 30, 1915, entitled "An act to provide for the leasing or other disposition of the W. & A. R. R. and its properties for the creation of the commission to effectuate such purpose, and to define its powers and duties; making an appropriation for the cost of the work required, and for other purposes." The material portions of this act are:

"Sec. 1. There is hereby created a commission to be known as the W. & A. R. R. commission, which shall be composed of the governor of the State, the chairman of the railroad commission, G. Gunby Jordan, Judson L. Hand, and Fuller E. Callaway, W. A. Wimbish is hereby named as attorney and counsel for the commission, and his salary shall be fixed by the commission."

"Sec. 2. The commission is hereby charged with the duty and is vested with full power and authority, except as herein provided, to ascertain, consider and determine the terms and conditions upon which the W. & A. R. R. shall be leased, to become effective on the expiration of the present outstanding lease, to wit: Dec. 27, 1919."

"Sec. 3. The commission shall, among other things, consider and determine, subject to the provisions of this act, the following:

"7. What, if any, property is owned by the W. & A. R. R. not useful for railroad purposes, that could be properly and advantageously disposed of separately from the lease of the road.

"8. What, if any, steps should be taken to assert the right of title of the State to any part of the right of way or properties of the road that may be adversely used and occupied.

"Sec. 5. Among the duties to be required of the commission shall be included the following: It shall cause to be prepared, if not

otherwise obtainable, complete and accurate surveys, maps, profiles [fol. 347] and estimates, showing—

“2. The extent and character of every use or occupation of the right of way, tracks and other properties of the road by any person or corporation other than the lessee, and the authority therefor.

“3. The properties not used or apparently not useful for railroad purposes, with an estimate of the market value of such properties, and the use to which they might be applied.

“Sec. 6. Be it further enacted, that the commission, in pursuance of a resolution to be adopted by a majority of the members thereof in regular meeting assembled, is hereby fully authorized and empowered to lease and contract for the leasing of the railroad properties known as the W. & A. R. R., including the terminals, thereof, and its property other than its railroad property, not connected with either of its terminals; and the same may be leased either in its entirety or as a part, whether surface, underground or overhead rights; and the commission shall recommend and report to the general assembly what disposition shall be made of the part of the property which the commission concludes cannot be advantageously leased—

“Sec. 6A. The said commission shall also include in said report a full and complete inventory of all personal property, rolling stock, equipment, supplies, tools, etc., to be included in the lease, as received from the present lessee, together with a statement of condition and estimated value.

“Sec. 8. The commission is hereby further instructed and directed to prepare, so that the same may be presented to the general assembly with the report of the commission, bills carrying into effect any recommendation *with* the commission may make—with respect to what steps should be taken to assert the right and title of the State to [fol. 348] any part of the right of way of any part of the road that may be adversely used or occupied; and with respect to any other recommendations which, in its opinion, and which may require legislation by the general assembly of Ga. to fully completely and adequately protect all the interest of the State of Georgia, in regard to said road and all of its parts and properties, whether reckoned as surface, overhead or underground rights.

“Sec. 11. The persons, associated or corporation accepted as lessees under this act, if not already a corporation created under the laws of Georgia, shall from the time of such lease being entered on the executive minutes, and until after the final adjustment of all matters springing out of said lease contract, become a body politic and corporate under the laws of this State, under the name and style of the Western & Atlantic Railroad, which body corporate shall be operated only from the time of their taking possession of said road as lessees; and it shall have the power to sue and be sued on all contracts made or to be performed, and all torts committed by said company, in like



manner and time and place as other railroad companies operating railroads in this State may sue and be sued, after the execution of said lease or for any cause of action which may accrue to said company or to which it may become liable.

"\* \* \* The principal office and place of business of said company shall be in this State; provided that nothing in this act shall be construed as an amendment of the charter of any corporation which may lease said road.

"Sec. 12. The principal office of the Western & Atlantic Railroad shall be within the limits of the State of Ga.

"Sec. 17. The leasee or lease company hereunder shall be subject to, and required to observe and obey, all just and reasonable rules, [fol. 349] orders, schedules of freight and passenger tariffs as may be prescribed by the laws of this State, or the railroad commission of Ga. in like manner and to the same extent as other railroads in this State."

The lease by the State of Georgia to Nashville, Chattanooga & St. Louis Railway, to wit:

STATE OF GEORGIA,

County of Fulton:

Whereas, by an act of the general assembly of the State of Ga., entitled "An act to provide for the leasing or other disposition of the W. & A. R. R. and its properties; for the creation of a commission to effectuate such purpose, and to define its powers and duties; making an appropriation for the cost of the work required, and for the other purposes," approved November 30, 1915, and the acts amendatory thereof and supplemental thereto approved August 4, 1916, and *August 4, 1916*, and August 19, 1916, respectively, there was created a commission to be known as the W. & A. R. R. Commission, which commission was by the provisions of said acts authorized and empowered to lease and contract for the leasing of the railroad properties known as the W. & A. R. R. including the terminals thereof and its property other than its railroad property not connected with either of its terminals; and was further authorized and empowered to fix and determine all the terms and conditions upon which the said property should be leased, except as limited by the provisions of said acts, and was further authorized and empowered to agree upon all the terms and details of a formal lease contract, which upon being prepared and certified to the governor by the said commission should be executed by him in behalf of the State:

And whereas, the said commission, organized in pursuance of the [fol. 350] provisions of said acts, has in regular meeting assembled, by a unanimous resolution agreed to lease said property to the N. C. & St. L. Ry. a corporation duly organized and existing under the laws of the State of Tennessee, with its principal office at Nashville, Tenn., under the terms and conditions hereinafter set forth, which resolution, together with all the terms and details of this lease contract,



has been certified to the governor of the State of Georgia by the said commission;

And whereas, it is further provided in said acts that when said lease contract shall have been so prepared and certified to the governor, the same shall be executed by him in behalf of the State of Ga.

Now therefore this indenture, made and entered into on this 11th day of May in the year of our Lord, 1917, by and between the said State of Georgia, as represented by Nathaniel E. Harris, governor of the State for and in behalf of the said State, as party of the first part, and the said The N. C. & St. L. Ry., a corporation as aforesaid, as party of the second part:

Witnesseth:

First. The said party of the first part, under and by authority of the said act approved November 30, 1915, and the acts amendatory thereof and supplemental thereto, approved August 4, 1916, and August 19, 1916, respectively, and in pursuance thereof, and of the said resolution of the said W. & A. R. R. commission in consideration of the premises and of the conditions, covenants, and stipulations herein set forth, does hereby lease, for a term of fifty (50) years beginning from and immediately at the termination of the lease contract now existing (which will terminate on the 27th day of December, 1919), and ending on Dec. 27, 1969, to the said party of the second part, viz: to the N. C. & St. L. Ry. the said W. & A. R. R. a railroad running from the city of Atlanta in the State of Ga. to the city of Chattanooga, in the State of Tennessee, including the terminals thereof, and its property other than its railroad property not connected with either of its terminals, together with all its houses, work shops, rolling stock, depots and appurtenances of every kind and character, belonging and appertaining to said railroad, except the following pieces or parcels of land, to wit: Those certain lots or parcels of property lying and being in the city of Chattanooga, Hamilton county, Tenn., described as follows, to wit:

(a) That tract or parcel of land bounded by Market Street, Georgia Avenue and Tenth Street, upon which there is situated a four story brick building now occupied by the Southern Express Company.

(b) That tract or parcel of land situated at the corner of Market and Eleventh Streets, upon which is situated a four story brick hotel building, now known as the Eastern Hotel.

All being the property of the State of Ga., and which the said acts of the general assembly of Ga., hereinbefore mentioned authorized the W. & A. R. R. commission by resolution to lease, and which further empowered and authorized the governor of said State, when such resolution was certified to him, to execute the lease contract on behalf of the State of Georgia.

Second. Subject to and in accordance with the terms, limitations and provisions of this contract of lease and of the several acts of the general assembly authorizing the same, the party of the first part covenants the quiet and peaceable possession and enjoyment of all

the property herein leased to the party of the second part, as against any acts that may be done or under the authority of the State of Ga.

Third. It is stipulated and agreed that said lease is made to said [fol. 352] party of the second part, with all the rights, powers and privileges conferred on it by said act approved November 30, 1915, and the acts amendatory thereof, and supplemental thereto approved August 4, 1916, and August 19, 1916, respectively, and subject to all the requirements, obligations and duties thereby required of it, all of which provisions the said party of the second part hereby agrees faithfully to perform.

Fourth. The said party of the second part agrees and binds itself to pay into the treasury of the State of Ga. in advance, on the first day of each and every month during the period of the lease, the sum of forty-five thousand (45,000) dollars, and further agrees to deposit with the treasurer of the State of Ga. recognized valid bonds of the State of Ga. or of the U. S. of the par value of six hundred thousand (600,000) dollars, which deposit shall be subject to the requirements and provisions of sections nine (9) and ten (10) of the said act approved November 30, 1915, the party of the second part, through any person authorized by it, shall have access to said bonds for the purpose of clipping the coupons thereof in order to collect the interest on said bonds.

Fifth. The party of the second part agrees that it will at all times during the continuance of this lease keep and maintain said railroad, including all of its structures, rolling stock, equipment and appurtenances used in connection therewith, including rolling stock and equipment added to the property of the State under section six (6) of this contract, in a condition at least equal to that of first class railroads within the State of Ga., and adequately adapted efficiently, safely and expeditiously to serve the public as a common carrier in the transportation of freights and passengers.

Sixth. It is further agreed as a part of the consideration of this [fol. 353] contract of lease, that in addition to and exclusive of such expenditures as may be required for the proper repair and maintenance of said railroad and its properties the party of the second part shall credit annually to an account called "Additions and Betterments of the W. & A. R. R." such an amount as will show at the end of any year during the term of the lease that there has been credited thereto an aggregate amount equal to sixty thousand (60,000) dollars, multiplied by the number of years the lease has run.

It is agreed and stipulated that there shall be charged to such account only such expenditures as are classed to be additions and betterments under the rules at present issued by the interstate commission, these expenditures, so charged to the account of Additions and Betterments of the W. & A. R. R. shall continue to be made annually during the entire period of the lease until an aggregate amount of three million (3,000,000) dollars has been so expended. At the termination of the lease by maturity or for any other cause prior to maturity, any balance remaining unexpended to the credit of said

account, that is, an average of sixty thousand (60,000) dollars per year, during the time the lease has run when terminated, shall be paid over to the State of Ga. All additions and betterments so made and charged against such account shall be and become the property of the State of Ga., and subject to the provisions of this lease, without abatement, deduction or off set of any kind or character whatsoever.

The expenditures above referred to, subject to the definition and limitation above expressed, shall be made by the party of the second part as and when deemed by it expedient and desirable. The party of the second part shall annually, on or before the 20th day of January in each and every year, prepare and file with the Railroad Commission of Ga. or such other authority as the State may hereafter [fol. 354] designate, a statement showing in detail the character and extent of the improvements, betterments and additions claimed to have been made by the party of the second part during the preceding calendar year ended December 31, which statement shall show the specific character of each expenditure and the amount thereof for which credit is claimed by the party of the second part. The said railroad commission of Ga., or other designated authority, shall examine such statement and account, and if found correct shall endorse approval thereon within six- (60) days after submission thereof and file the same with the custodian of the records of the W. & A. R. R. Should the said railroad commission of Ga., or other designated authority acting at the time, question the correctness or propriety of any item or charge of the statement or account, and should fail to come to an agreement with the party of the second part with respect thereto, the matter in dispute shall be submitted to arbitration in the manner as is now provided by the laws of the State of Ga. in section 5030 to 5034, both inclusive, of the Code of Ga. for 1910.

Seventh. It is understood and agreed that in making improvements and betterments for the use and operation of the W. & A. R. R. the party of the second part shall, in so far as it properly may, construct and maintain the same upon the property of the State, to the end that the integrity of the W. & A. R. R. for the uses of transportation shall be preserved and facilitated.

Eighth. Whatever additional lands or rights of way may be required for revision or double tracking of the line of road, or for other additional tracks or station grounds, shall be acquired at the cost and expense of the party of the second part, but the title thereto shall be taken in the name of the State of Ga., and the same shall be and become a part of the W. & A. R. R. and as such subject to [fol. 355] all of the terms and conditions of this contract. The party of the first part will give its consent to the revision and double tracking of the line as deemed desirable by the party of the second part, and will cooperate in securing the land necessary therefor at the expense of the said party of the second part, the title thereto to be taken in the name of the State as last above provided.

It is understood and agreed that no radical departure in the route

or direction of the line of railroad, nor abandonment or discontinuance of any part of the line as now constructed and operated, shall be made or permitted without the previous consent of the railroad commission of Ga., in behalf of the State, or other such authority as the State may hereafter appoint and designate.

Ninth. It is understood and agreed that the party of the second part shall be exempt, during the entire term of said lease, from the payment of any taxes, of whatsoever nature, on said properties lying within the State of Ga., and upon all properties hereafter acquired and charged to the account of "Additions and Betterments of the W. & A. R. R." as provided in section sixth (6) hereof, and from the payment of any privilege, franchise or other taxes for the operation of said property. But the party of the second part shall pay all tax assessments and governmental charges as may be imposed during the term of said lease by the government of the United States, and shall be required, and hereby obligates itself to pay on all of that portion of the leased properties covered by this contract, lying within the State of Tenn., all taxes and assessments that may be legally levied under the laws of said State. But nothing herein shall be construed as exempting from taxation the rolling stock, equipment or other property owned by the party of the second part and used in connection with the operation of the properties herein leased, all [fol 356] of which shall be subject to taxation as other like property is taxable in the State of Ga.; provided, however, that if such rolling stock, equipment or other property so used in connection with the operation of said leased properties be properly charged at any time to the account of "Additions and Betterments of the W. & A. R. R." under the provisions set forth in the sixth (6) section of this contract, the same shall thereafter be exempt from taxation by or under authority of the State of Ga., to the same extent as the properties herein leased and lying within the State of Ga.

Tenth. The right of the party of the second part to sublet any part of the property not useful for railroad purposes shall be exercised subject to the terms, conditions, obligations and requirements of the said acts of the general assembly and of this contract of lease. No such subletting shall extend beyond the term of this lease, whether by expiration of time, forfeiture or other cause, nor shall any such sub-lease confer upon the tenant or sub-lessee any greater or other right to use the property than the party of the second part would have under this contract of lease, nor shall it give raise to any privity of contract as between the sub-lessee and the State; nor introduce a new party to this contract, nor relieve the party of the second part of any duty, obligation or requirement imposed upon it by law or by this contract of lease.

Eleventh. The granting by the party of the second part of trackage rights to other carriers over the W. & A. R. R. *Railroad* or any part thereof shall not be construed as a subletting of the property, such as is forbidden by section 11-A of the act without the written consent of the governor of the State, provided, however, that such use of the tracks

[fol. 357] and property of the W. & A. R. R. shall always be had and exercised subject and subsidiary to the domination and control of the party of the second part, and further subject to all of the duties, obligations and liabilities of the party of the second part to the State of Ga., under the acts of the general assembly of Ga., and this contract of lease; and it is further understood and agreed that no contract or agreement for any servient use of the tracks or railway facilities of the W. & A. R. R. granted by the party of the second part to any other person, shall be construed as introducing a new party to the contract between the party of the second part and the State of Ga., and every such servant use shall be subject in all respects to this contract of lease, and as between the State and the party of the second part such servants use shall be regarded as being the use by the party of the second part, through its agent or tenant.

Twelfth. There is hereby expressly reserved to the party of the first part the power to authorize the laying out, building and construction of such ways, streets, roads, bridges, or viaducts across or along the properties leased as may be deemed to be to the interest of the people of Ga., without let or hindrance, and without liability over the party of the second part by abatement of lease money or otherwise, as is provided in section 11-B of the said lease act, approved November 30, 1915.

Thirteenth. At the expiration of the term of said lease the State of Ga. may claim the right of purchasing from the party of the second part any or all property or properties acquired by it during the term of the lease and used for the convenient operation of the W. & A. R. R. under the following conditions, to wit:

(1) The State shall give to the party of the second part notice of its desire to acquire such property at least one year before the expiration of the lease, or in the event of an earlier termination of the lease by forfeiture or otherwise, within six months after such termination.

(2) If the party of the second part is willing to sell such property to the State, its reasonable value, as defined in paragraph four (4) of this section, at the time the notice of such claim of right to purchase is given to the party of the second part, shall be paid by the State of Ga., and in the event the parties hereto cannot agree as to such reasonable value, the amount thereof shall be determined by arbitration as now provided by sections 5030-5054 both inclusive, of the Code of Ga. for 1910.

(3) In the event the party of the second part is unwilling to sell any parcel or piece of property which the party of the first part gives notice it desires to purchase, the respective rights of each shall be determined by arbitration under the aforesaid sections of the Code of Ga. The arbitrators shall first determine whether the party of the second part shall be required to sell said parcel or piece of property, in determining which the arbitrators shall give consideration to the necessity of each party for the use of said property or

any portion thereof. Should said arbitrators determine that the party of the second part should not, if unwilling, be required to sell the whole of said parcel or piece of any portion thereof, then said arbitration shall be final as provided in sections of the Code of Ga. Should, on the other hand, said arbitrators determine that the party of the second part should though unwilling, be required to sell the whole of said parcel or piece of property, then said arbitrators shall be authorized to proceed to fix a reasonable value to be paid by the party of the first part. Should said arbitrators determine [fol. 359] that the said parcel or piece of property should be divided between the parties hereto, then they shall proceed to assign to each the particular portion thereof, which, in their judgment, each should have, and shall also fix the reasonable value of the portion so assigned to the party of the first part.

(4) In no event shall the reasonable value of any property so acquired by or assigned to the party of the first part under the provisions of this section be fixed at a greater sum than the cost of such property, including improvements thereon, to the party of the second part, plus twenty five (25) per centum thereof.

(5) It is further agreed that whenever the party of the second part shall acquire and be prepared to enter upon the use of any property of the character of that contemplated and referred to in this section, it shall within ninety (90) days thereafter furnish to and file with the railroad commission of Ga. or other authority that may be hereafter designated by the State of Ga., a statement or report setting out a description of the property, its location, its contemplated use and the purchase price thereof. If the property shall have been acquired upon a consideration other than the payment of money, such consideration, together with the value of the property, shall be stated.

Fourteenth. The right is hereby expressly reserved to the party of the first part to remove and cause to be discontinued any or all encroachments and other adverse uses and occupancies in and upon the right of way or upon the other properties of the W. & A. R. R. or any part thereof, whether maintained under claim of lawful right or otherwise; and to this end the party of the second part hereby consents that the State may withhold delivery of possession, or right [fol. 360] or possession to the party of the second part of such parts of the right of way and other properties as may be so adversely used and occupied, until such encroachments and other adverse uses and occupancies shall have been removed or discontinued; and the State of Ga., may, at its option and in such manner as it may deem best, proceed to remove such encroachments, uses and occupancies, acting therein in its own name and behalf as the owner of the property. It is further understood and agreed that the party of the second part will, if and when so requested, join with the State and become a party to any proceeding, judicial or otherwise, that may be instituted by and on behalf of the State for the purpose of freeing the right of way and property of the W. & A. R. R. from all adverse uses and



occupancies; provided that nothing herein shall be construed as applying to the tenants and licenses of the present lessee.

It is understood and agreed that when such adverse uses and occupancies shall have been removed by judicial proceedings or otherwise the use of the same for the remaining period of the lease shall inure to the benefit of the party of the second part to the same extent as the other portions of the right of way and properties herein conveyed shall inure to it under the terms and provisions of this contract.

Fifteenth. Should, during the term of this lease, any building or other structure now upon the property of the party of the first part included in this lease, or any building or other structure hereafter constructed thereon be damaged or destroyed by fire during the term of this lease, the party of the second part binds and obligates itself to restore such building or structure, within a reasonable time, in substantially as good condition as previous to said damage or destruction.

Sixteenth. It is expressly agreed that should any of the terms, or [fol. 361] conditions of this contract of lease be found to be inconsistent with any of the terms or provisions of the aforementioned acts of the general assembly of Ga. authorizing the making of the same, in such event the terms and provisions of the said acts shall govern and control.

Seventeenth. It is further contracted and agreed that upon the expiration or termination of this lease for any cause, the party of the second part shall account to the party of the first part for the value of all of the rolling stock, equipment, and other movable property belonging to the W. & A. R. R. both that originally owned by and received from the State at the beginning of the lease, as well as that as to which the ownership of the State may have lease, as well as that as to which the ownership of the State may have been acquired by having the cost thereof charged to the account of "Additions and Betterments of the W. & A. R. R." as provided in the sixth (6) and ninth (9) section hereof.

On such accounting the party of the second part shall pay to the party of the first part the inventoried value of said rolling stock, equipment and movable property received from the State at the beginning of the lease, together with the cost value of all of the rolling stock and equipment acquired during the currency of the lease and becoming the property of the State by being charged to said account of "Additions and Betterments" or the party of the second part may turn over to the State rolling stock and equipment in suitable condition for efficient use and service, in amount at least equaling in value of the rolling stock and equipment so received from and acquired for the party of the first part as in this contract contemplated and provided for.

Should the party of the second part prefer and offer to replace [fol. 362] the rolling stock and equipment so received from or acquired for the State as herein provided, and the parties should fail



to agree upon the value or efficiency of the rolling stock and equipment so offered, the question of such value or efficiency shall be submitted to arbitration in the manner now provided by sections 5030 to 5054, both inclusive, of the Code of Ga. for 1910.

In witness whereof, the said Nathaniel E. Harris, as Governor of the State of Georgia, has hereunto attached his official signature and caused to be affixed the great seal of the State of Georgia, in behalf of the said State in duplicate, and the said The Nashville, Chattanooga & St. Louis Railway, has, by its president, John Howe Peyton, who is authorized by said corporation so to do, signed and executed this contract and caused to be affixed by its secretary the corporate seal, also in duplicate, on the day and year above written.

Executed in duplicate in the presence of

N. E. Harris, Governor of the State of Georgia, in Behalf of the State of Georgia. Philip Cook, Secty. of State. (Seal Attached.) The Nashville, Chattanooga & St. Louis Ry., By Jno. Howe Peyton, President. Attest: J. P. Hill, Asst. Secretary. (Seal.)

The Georgia Act of August 4, 1916, entitled "An Act to amend an act approved November 30, 1915, providing for the leasing or other disposition of the Western & Atlantic Railroad and its properties, and for the creation of a commission to effectuate such purpose, and for other purposes, by adding thereto other provisions further defining the powers and duties of the said commission; and for other purposes." The material portion of which is:

"Section 5-A. The said commission, subject to direction in specific [fol. 363] cases by the general assembly, is hereby given full power and authority in its discretion to deal with and dispose of any and all encroachments upon, and uses and occupancies of any part of the right of way and properties of the W. & A. R. R. by any person other than the present lessee, and its tenants and licensees under and during the term of the present lease, whether such encroachments, use or occupancy be permissive or adverse, and whether with or without claim of right therefor. The said commission is hereby fully authorized and empowered to determine whether such encroachments, uses and occupancies, or any of them, shall be removed and discontinued, or whether they, or any of them shall be permitted to remain, and, if so, to what extent and upon what terms and conditions. The said commission is further authorized to adjust, settle, and finally dispose of any and all controversies that may exist or that may arise with respect to any adverse use or occupancy of any part of said right of way and properties of the Western & Atlantic Railroad, in such manner and upon such terms and conditions as it may deem the best interests of the State require; and all contracts and agreements that said commission may make or enter into in settlement or disposition of all matters touching such adverse uses and occupancies shall be binding upon the State. The said commission is further authorized and fully empowered to take

such action as it may deem proper and expedient to cause the removal and discontinuance of any encroachment, use or occupancy of said right of way and properties which in its opinion should be removed or discontinued, and to this end the commission is authorized and empowered to institute and prosecute, in the name and behalf of the State of Ga. such suits and other legal proceedings as it may deem appropriate in protection of the State's interest, or the assertion of the State's title."

[fol. 364] The joint resolution of the general assembly of Ga. approved August 17, 1920, to wit:

"To discharge the W. & A. R. R. Commission from further duties or responsibilities as to the lease or other disposition of the W. & A. R. R. under the act of the General Assembly approved Nov. 30, 1918, and the acts amendatory thereof, and to confer certain of its powers and duties on the Railroad Commission of Ga.

"Whereas the W. & A. R. R. commission, created by the act of the general assembly approved Nov. 30, 1915, for the purpose of leasing or otherwise disposing of the W. & A. R. R. and its properties, has under the provisions thereof, made and completed new leases of said railroad and all of its properties, made delivery of the same to the new lessees, and reports thereof to the general assembly;

"Now, therefore, be it resolved by the senate, the house of representatives concurring, that the said W. & A. R. R. commission be, and is hereby discharged and relieved of any and all further duties or responsibility, under the provisions of said act of the general assembly, approved November 30, 1918, creating said commission and defining its powers and duties.

"Be it further resolved, that the powers and duties conferred upon said commission by said act of 1918 and the acts amendatory thereof, as to encroachments upon the said railroad and its properties, and the general supervision over said railroad and its properties, be and they are hereby conferred upon and vested in the railroad commission of Ga., in the same full and ample manner as heretofore conferred and imposed upon the said W. & A. R. R. commission, provided, the said railroad commission of Ga. shall have no power to sell any of said property, or otherwise dispose of same.

[fol. 365] "Be it further resolved that W. A. Wimbish, counsel for the commission, appointed by the general assembly in 1918 and now in charge as attorney of the litigation with the Southern Railway for the discontinuance of encroachments at and near Dalton and Atlanta, be directed to report to the Railroad Commission.

"Be it further resolved that all laws and parts of laws in conflict with this resolution be and are hereby repealed."

The order of the W. & A. R. R. Commission appointing W. A. Wimbish counsel for the commission and directing him to institute and prosecute suits and legal proceedings therein mentioned, a copy of which resolution is attached as Exhibit 14 to an amend-

ment to defendant's answer in this cause. The court stated to the jury that recitals in this resolution to the effect that the N. C. & St. L. Ry. as lessee, has represented to this commission that the W. U. Tel. Co. is adversely occupying and using — was not admitted as evidence to prove that fact but is only admitted as a statement that such facts had been represented to the commission and not as proof of those facts themselves.

An order of the railroad commission of Ga. appointing Hooper Alexander, attorney, in the place of W. A. Wimbish, of which the following is a copy:

Chas. Murphy Candler, Chairman; Paul B. Trammell, Vice Chairman; James A. Perry, John T. Bouifeuillet, J. D. Price, Commissioners. Albert Collier, Secretary. E. M. Price, Rate Expert. James K. Hines, Special Atty.

Telephone Main 960

Office of the Railroad Commission of Georgia, Atlanta

Whereas, under an act of the general assembly approved Nov. 30, [fol. 366] 1915, and acts amendatory thereof, creating the W. & A. R. R. Commission and defining its powers and duties, the said commission thru W. A. Wimbish, Esq., its counsel, instituted suits in the name of the State to remove alleged encroachments upon the property of the State road, known as the W. & A. R. R. by the Southern Railway in Fulton and Whitfield counties, in the superior court of said counties, and also against the W. U. Tel. Co., for alleged encroachments along the right of way of said railroad, which said suits are now pending, and

Whereas, since said suits were filed the said W. A. Wimbish has died; and

Whereas, under a joint resolution of the general assembly approved August 17, 1920, the W. & A. R. R. commission was discharged and released from further duties in connection with said railroad and the powers and duties as to encroachments upon said railroad and its properties theretofore conferred upon it were expressly conferred upon and vested in the Railroad Commission of Ga., and the said W. A. Wimbish directed to report to the said Railroad Commission, and

Whereas, since his death this commission is without counsel in said suits,

Therefore be it resolved that the special attorney to this commission, Judge E. J. Reagan be and he is hereby requested to take charge in behalf of this commission representing the State, of the said litigation with the Southern Railway in Fulton county and in Whitfield county, and bring the same to a conclusion as early as possible, and,

Whereas, the Nashville, Chattanooga & St. Louis Ry. lessee of the W. & A. R. R. represents to this commission that because of his

familiarity with the facts and issues involved in the suit against the [fol. 367] W. U. Tel. Co., it is to the interest of the State to have the professional services of Hooper Alexander, Esq., as the commission's attorney in said case, and agrees to pay his fees as well as all court and other costs in the same;

Ordered: That upon these conditions this commission does hereby designate said Alexander as attorney in place of W. A. Wimbish deceased.

Resolution adopted by the Railroad Commission of Ga., Jany. 9, 1922.

(Signed) Albert Collier, Secretary.

[fol. 368] HUNTER McDONALD, being sworn as a witness for the plaintiff, testified:

Direct examination:

I am chief engineer of the N. C. & St. L. Ry. I have been chief engineer of that road since November, 1892. Prior to that time I was resident engineer on the W. & A. R. R. under the direction of the chief engineer of the N. C. & St. L. Ry., which had leased the road. I was located then in Atlanta, Ga. Prior to that time I had been doing engineering work, after leaving Washington & Lee University in Virginia in 1879, and in December of that year I entered the service of the N. C. & St. L. Ry. and since that time I have occupied quite a number of positions under the general title of Asst. Engineer. I was for a part of the time division superintendent and engineer of construction. In Feby. 1891, I was directed to come to Atlanta and take charge of the W. & A. R. R. as resident engineer. I have been connected with this road and connected with the work of civil engineer nearly forty-two years. With the exception of three months service, since the first beginning of my work, I have been entirely in the employment of the N. C. & St. L. Ry. I am a member of the American Society of Civil Engineers. I was president of that society in 1914, I am a member of the American Railway Engineering Association, and was president of that in 1904 and 1905.

Q. Now Mr. McDonald I will get you to assume that the W. U. Tel. Co. has a line of poles and wires on the right of way of the W. & A. R. R. between Atlanta and Chattanooga, beginning between two and three miles out from the center of Atlanta and running up to about the seven mile post from Chattanooga, mainly on what is called the left side of the road looking towards Chattanooga, and crossing it three or four times, in three or four places between [fol. 369] here and there, I will get you to state, what, in your opinion would be a reasonable time for the removal of the poles and wires of the W. U. Tel. Co. from the right of way of the W. & A. R. R. if it was found they ought to be removed?

A. I assume the time you wish me to take into consideration would be the movement of the lines from the right of way to some other point?

Assuming that point would be adjacent, I should say it would require from about three to six month to remove them.

Q. You have a general familiarity with the location of that telegraph line and with the right of way of the W. & A. R. R. I will get you to state what detriment or damage to the use of the right of way by the N. C. & St. L. Ry. and also of the State of Georgia it is to have poles, wires and fixtures of a telegraph company on the right of way?

A. It is a very great inconvenience and a burden upon the operating department of the railroad to have a line of poles, with wires stretched from them and cross arms from them occupying any part of the right of way. It is specially so, if the men who are to maintain that line are not under the orders of the superintendent of that division, of that line, on account of the fact that it is at many points at close proximity to the track and interferes with a number of operations, such as building side tracks and setting out cabooses temporarily and for carrying on operations by ditching machines and operations of cranes the booms of which are sometimes forty-five feet long; clearing up the right of way, the cutting of grass and weeds, and disposing of old cross ties that have to be burnt; and there are a number of other matters in which they [fol. 370] operate to hamper and put a burden on the operation of the road on the part of the officials of the line.

In the maintenance and repairs of the telegraph line of the W. U. Tel. Co. on the right of way the employees of that company go upon the right of way for that purpose, they are compelled to do so, and they do in the ordinary maintenance of their lines. They are not under the control of the N. C. & St. L. Ry. in doing so.

#### Cross-examination:

I have been connected with the W. & A. R. R. and the N. C. & St. L. Ry., operating the W. & A. R. R. continuously for about forty years in one capacity or another, and during a part of that time I was in charge of the maintenance of way; not in charge of operations on the W. & A. R. R. The telegraph lines which are now along the W. & A. R. R. are in substantially the same location that they have been and always been since your connection with the W. & A. I have not had occasion to examine all of the deeds under which the W. & A. R. R. claims title to the right of way. In cases where they have rights of way—have deeds for depot grounds, I had had occasion in some instances to go into that in some detail, but as to deeds for the right of way, I have not had occasion to examine them in many instances; there have been rare instances where I have.

Q. You know, as matter of fact, there are many deeds to the right of way, under which it is claimed the W. & A. or the State of Ga. have right of way?

A. I have understood they have rights of way for a very large part. I have understood they have deeds for a very large part of the right of way.

I have had access to what purports to be copies of the deeds for right of way, purposes pertaining to the W. & A. R. R. They are in letter book form, tissue copies, typewriting.

[fol. 371] Q. And you find deeds making conveyances to right of way, or rights to operate over certain lands on the part of the W. & A. R. R. do you not?

A. There are deeds that give right of way over or through certain land lots.

Q. Now, Mr. McDonald, in your examination of this right of way the deeds therefor you found some right of way to which there were no deeds in existence, and the State of Ga. or the W. & A. R. R. have been operating without deeds, did you not?

A. I found it very difficult to determine where any one of these deeds like I said, were simply made many years ago by simply calling for right of way through land lot lines, and when a question came up a deed through a land lot, where it just stated through such land lot, it was necessary to find where the lot was located, it has only been the exception that a case came up where I have had to resort to any such deeds. There may be points where there are no deeds, but I don't know where they are and cannot say where they are, if there are such cases.

From my knowledge of such examination of deeds as I did make I am unable to say whether there are deeds conveying the right of way for the entire length of the line or whether there are portions of the right of way to which there are no deeds, but which are possessed and held simply by possession, so far as my examination of deeds is concerned.

That is true, my examination of these deeds—I never did examine them sufficiently; I was never called on to determine the question whether we had deeds all the way through or not.

I cannot say whether I have or have not deeds all the way through for right of way.

I wish to state, so far as the deeds themselves are concerned they [fol. 372] are not in possession of the N. C. & St. L. Ry. if there are any.

I have stated that, in my opinion there are certain detriments by a telegraph line being along a railroad.

It is true that there are advantages to a railroad in having a telegraph line along its right of way, if the railroad owns and controls it.

If the railroad does not own and control it, I don't know of any advantages that there are. It is customary for railroads to operate their trains by telegraph if the railroad does not equip its lines with telephones. In the year 1870 I should regard a telegraph line along the right of way of a railroad as being indispensable to the successful and expeditious handling of trains. It became an absolute necessity as soon as the telegraph was invented and found practicable, so far as I know. What I meant to say was, as soon as the applicability of a telegraph line became apparent for operating trains successfully,



it was then recognized as a necessity, just as the matter of telephones now are indispensable to every citizen. Telephones come in about the eighties, practically. The first one I ever heard was in 1877 or 1878. The telephone was not in general use until the 80's and then it became in general use. Prior to 1880 the telegraph line was necessary to the expeditious and safe operation of a railroad. My recollection of operating methods and conditions does not go back beyond 1891 on the W. & A. R. R. or beyond 1879 on any railroad, and I am unable to say what advantages or disadvantages resulted from the location and maintenance of a telegraph line on the W. & A. R. R. prior to 1879 or prior to even of 1891. I am unable to say prior to 1891 whether there was any detriment to the road by the maintenance of these telegraph lines of my own knowledge.

Q. But, Mr. McDonald, if a railroad company didn't own a telegraph line and did not own a telephone line along its right of way, either of those, it would be essential and necessary for the safe and proper operation of that railroad for there to be along that railroad a telegraph line would there?

A. If the railroad didn't own either one of them it would have to be owned by somebody else. Unless they develop wireless to the extent that they can use it successfully for such. They haven't yet developed it to that extent. It is being worked on. The wireless is not used today by railroads.

Q. Mr. McDonald, isn't it true that telegraph lines along railroads insure the ability to telegraph from one station to another station of the presence of and whereabouts of trains going back and forth and isn't that a means of preventing wrecks and disaster and destruction of life and property?

A. The use of a telegraph line along a road is of great convenience and does tend to the expeditious operation, but it is not essential that these poles should be located on the right of way of the railroad in order to accomplish that purpose.

The ability to communicate by electricity does greatly expedite the operation of the railroad. Telegraph lines along a railroad and between stations, of that railroad do give facilities to the railroad to communicate over those lines from station to station as to the movement of trains, and is of great benefit in avoiding dangers and disaster.

That is true. And the use of those telegraph lines connecting those stations does greatly safeguard both life and property, and prevents many wrecks and the killing of many people.

Q. Then whatever disadvantages there are to a railroad from the [fol. 374] presence of a telegraph line on its right of way, that detriment or disadvantage is much less than the advantage which such a telegraph line gives to a railroad company in the operation of its trains—is that not true?

A. I don't know, that I can quite answer your question because I can conceive they can have the use of its telegraph lines without having it on its right of way at all.

Q. I am asking you, you are an engineer of forty years standing if the presence of a telegraph line along and on a railroad right of



way which affords the means of communication from point to point on that railroad, if that service so afforded by a telegraph line is not of great advantage, and of much greater value to the railroad than any incidental detriment to it due to the presence of that telegraph line on the right of way?

A. I think you are correct about that, it would be very greatly to the advantage of a railroad, and a railroad would prefer to have a line of poles on its right of way than to have to dispense altogether with the use of the telegraph. From the times the telegraph came into use on practically all railroads of the country, telegraph lines were installed on the right of way, of railroads and maintained and operated there and have been continuously up to the present time. While these telegraph lines serve the railroads it also is a medium of communication between the public at large, which is also of very great value. The public at large use the telegraph for their own purposes.

In the past 40 years. I have passed over the railroads in the U. S. I have been in all the States in the Union, except about 5 I believe I have made quite a number of trips over lines between Nashville and New York and between Nashville and Chicago, but I rarely go [fol. 375] off of our own lines, or away from our territory. It is exceptional when I do. I have been traveling over the railroads in all States of the Union except about 5. Now on all those railroads there appears to be telegraph lines that have been maintained along all of them; that has been my observation.

Q. And the distance of those telegraph poles from the railroad tracks are pretty uniform, about the same, are they not?

A. I could not undertake to say that; I merely noted their presence; I have not except in some special instances noted different lines. I made a special study of that question on the L. & N. Railroad at one time. The situation of the poles varied all the way from 7 feet to 150.

Q. Then the situation on the L. & N. railroad and along the W. & A. is about the same?

A. On certain parts of the line that might be true. There are situations on parts of the L. & N. railroad that are very different from those on the W. & A. R. R. For instance between Louisville and Cincinnati; or rather between Louisville and Anchorage, I believe, the right of way there is extremely narrow and the poles are very high and very close to the track and they are guyed and held in position. This is on the L. & N. but as a general proposition the idea is wherever they can do so conveniently, they place the poles at such distance out there they will not, in falling, interfere with the movement of trains and that plan has been carried out wherever it has been possible to do so—except where they have been confined by narrow right of way, except through Marietta, Adairsville and Dalton and one or two other points in cities.

N. C. & St. L. R. R. has constructed a line of telegraph poles of its own along its own railroad and on its own right of way from Chatta-[fol. 376] nooga northward to Nashville and beyond. The work has been in progress, I think for the past four or five years, and it is not

done yet. We have not constructed our line yet from Hollow Rock Junction to Memphis and one or two other points.

Notwithstanding any detriment to the operations of the railroad yet the N. C. & St. L. has constructed and is maintaining on its own rights of way in the State of Tennessee telephone lines.

And those telephone lines are constructed substantially in the same way as telegraph lines, substantially the same, those telephone lines, constructed by the N. C. & St. L. Ry., on its own lines in Tennessee, that construction is practically the same as the construction of the W. U. Tel. Co. lines along the W. & A. R. R. in Ga., I don't think we have been quite as disregarding of the advantages of location as they were in the older days. For instance the lines of poles on the W. & A. are now standing at points where, under our own construction we would not and do not place them, we try to keep the guys and braces out of our drainage, but in many instances, at present on the Western Union lines those poles are, the braces, are right in our ditches. There are other exceptions to the methods of construction that I might recall but that is the only one that I now have in mind. That is the only difference I now have in mind. I didn't say any poles were in ditches, I say braces and guy lines are in ditches, at different points along the lines, several points I remember where ditches are obstructed three or four, I don't recollect the number. Along the W. & A. there are more of that kind. I do not know when those ditches were put there with regard to the telegraph lines. I judge the ditches were made there before the poles were placed. In 1850 to 1860 I think they were more careful to dig ditches as they had to rely entirely on earth ballast and it was more [fol. 377] important to keep water away from the track. When I speak of posts, or supports in ditches I don't know whether they were construction or placed there by the telegraph line. I don't know who put them there, whether the Telegraph Company did or not.

Q. Mr. McDonald, you stated the telegraph line along the railroad was sometimes objectionable because it interfered with the building of side tracks?

A. And with the placing of switches.

Q. And also interfered with switches, do you recollect any particular instance of that character along the Western & Atlantic?

A. Where that has been the case?

Q. Yes.

A. I don't know that I can recall one right now.

Q. Can you recollect any instance along the W. & A. where these telegraph lines of the W. U. Tel. Co. interfere with the work of cranes or booms?

A. That is a matter which it would be rather hard to locate. I will say for the reason we operate these cranes from one end of the line to the other and *they* booms as a working radius of 45 feet; we use them for ditching, handling crossties, gathering up cinders and 25 or 30 specific purposes. Now, to undertake to say that a telegraph line at any one point, which stands within the average distance of say 22 feet from the track would interfere with it, my answer would be, it would interfere with it from one end to the other.

Q. What particular place, state any one instance, an actual instance, not a theoretical or suppositious case, but state any one case you remember, or state any one instance in point of fact where these poles of the W. U. Tel. Co. interfere with the booms and cranes of the W. & A. R. R. during your 40 years connection with its lessee?

A. My knowledge of the operation along the W. & A. R. R. are [fol. 378] not very close. My headquarter- are at Nashville, and you will have to get that knowledge of details from other witnesses.

Q. I am asking you as to your knowledge?

A. I don't know, I couldn't tell you about that—any specific instance in the operation.

Q. During your 40 years connection with the operations of these railroads you don't know of any instant where those poles interfered with the booms and cranes of the W. & A. R. R.?

A. I can tell you a particular instance where the lines interfered with the use of our wreckers in clearing up a wreck north of Cope-land's Crossing two years ago.

The train was derailed, I imagine due to the high speed, I don't know of anything else.

They interefered with clearing the wreck then?

At the time the wreck took place before it was being cleared when the accident occurred, I don't know whether officials of the road were notified by the W. U. lines there had been a wreck. Generally the W. U. is notified of it by the wrecking crew and often after we have been at the wreck for sometime. Usually the conductor or any surviving member of the crew, whose duty it is to do so, if he has a telephone field set, immediately hands it over the company's wire and notifies it by telephone. If not he goes to the nearest station and notifies the officials from there, by the company's wire. I mean the telephone wire operated by the Co. The Company's wire on the opposite side. The company has a telephone line. At the time of this wreck there was a telephone line on the opposite side. That telephone line was situated relative to the track just as the W. U. line was on the other side. Notwithstanding the interference with booms and cranes by those lines of poles and wires the W. & A. has [fol. 379] nevertheless constructed a line on the other side. We have a line there and we have to put up with the same interference but we cannot help it.

The wreck that I spoke of occurred about two years ago. I can't recollect exactly, I can't recollect any other instances where that occurred. I don't remember all instances on account of the fact I was not summoned to the location, because not being a major trouble, but I found this same interference. Of course, you can go on and clear these wrecks, which we have to do that if we can help it. Sometimes the character of the wreck does require destruction of the communication, but in many instances it does not and it is our effort always to endeavor to preserve the communication always as best we can. In this wreck two years ago, the interference was due to the fact the wires which remained were between the wrecks we were trying to get up and the boom we were operating, it interefered when the crane would reach out the wires and poles inter-

fered in clearing the obstruction and picking up the wrecks. They did no harm to the boom or to the crane, nothing except the interference with the conduct of the work. Being an obstruction in the way, it delayed and interfered with the progress of the work. Eventually we got them in but it delayed and interfered with the regular operation of the work. I used the cranes even though the wires were there. And I pulled the cars from the other side of the wires by means of the cranes, but it was considerable interference to have to do so without destroying the telegraph wires. I cannot tell you how much longer it took me by reason of the telegraph wires being there. The real interference simply was that there is the line of poles, here is your cars, and the wires are strung in between you, and you have to work under them from one side to the other, and [fol. 380] the poles are there to interfere. I cannot state by hours or minutes how much longer it took to do that work by reason of the presence of the telegraph lines, but I can state it was a very serious interference. I cannot tell how much more money it cost, because of the presence of those telegraph lines there. Another instance was the wreck at Copeland's crossing, the cars rolled all the way from the track out to 40 or 50 feet from the track. The telegraph poles were about 22 feet from the track. It was out in the middle of the field. Copeland's crossing was a public crossing. That wreck was not right at the crossing. The wreck was a quarter of a mile north of the crossing. The W. U. wires were finally cut down. They were not swept out by the wreck, if that is what you mean. They were not cut down before I started to work over crane and booms—I think not. They probably put in a cable before we got there. They usually do that if they have time. According to my recollection these telegraph lines were removed temporarily, at least while we were working on that wreck. They usually are when they can get there in time to do it. I cannot recollect another instance in which our cranes and booms were interfered with on the W. & A. but I can on the other lines of the system. At Vining now, between the main line and passing track, a telegraph line is standing between the main line and passing track. I do not know what double tracks or switches there were along the W. & A. in the 50's I have no knowledge of that, I first became connected with the W. & A. in Feby. 1891. We leased the road Dec. 27th, 1890, and I came here in Feby., 1891, about two months after we took the road over. Since 1891 there have been additional side tracks and switches from time to time constructed along the W. & A. I do not recollect at this moment any side track with which the W. U. Telegraph wires, along the [fol. 381] W. & A. interfered, nor any switches with which they interfered.

Q. Now, where there are switches and side tracks, or double tracks along the W. & A. you don't know which was constructed first, that is the W. U. Tel. line, along the railroad, or the switches and double tracks, passing tracks, do you? I am talking about your own knowledge?

A. I know of my own knowledge that since 1891 the poles of the W. U. Tel. Co. have been on the right of way, or adjacent to it, be-

tween Chattanooga, and Atlanta, and I think I know pretty well all of the side tracks that have been constructed during that period, although there have been quite a number of them.

I know nothing about the relative position of them prior to 1891. I don't know which were actually located first the W. U. lines or sidetracks. I think they began to use telephone lines for train dispatching about 10 years ago, I am not positive about that.

I think that is about correct. I spoke of the time that would be reasonable for removal of these W. U. lines, if they should be ordered to get off and I estimated the length of time to be from three to six months, but I made that answer conditional upon their removal of the poles to a point immediately adjacent to the right of way and that my three to six months' period would be from the time that the moving actually started until it was completed.

That was on the assumption that the W. U. had already acquired a right of way near or adjacent to the right of way of the railroad.

Q. Suppose they had not acquired an easement along and adjacent to the railroad right of way on which they could move their poles and lines, how long would it take probably to acquire such an [fol. 382] easement necessary for those telegraph lines?

A. Assuming they had the right to condemn that easement it would not take very long, because under the right of condemnation they can go upon and go on with their construction, but if they had to negotiate with each farmer as to the terms upon which they could occupy his land, it might take a great while, unless they had some more expeditious method.

However, there exists along the line on the same side as the Western Union now occupies, practically all the way, a highway that could be occupied.

They would have to get a consent from the State or consent from the counties and the State to occupy the highways? I would not know how long it would be.

If they had to begin now, to acquire the right of way and negotiate for it and were trying to be economical in the cost, it might take a year.

I would not think they would be able to get the right of way all the way from Chattanooga to Atlanta in less than a year. It would be that length of time in addition to the three or six months for the actual removal after the time the right of way had been acquired.

Yes, for the removal of the poles and wires.

#### Redirect examination:

If the Western Union Tel. Co. has the right to occupy with its poles and wires the public highway, and there is a public highway running from Atlanta to Chattanooga, being most of that distance within a very short distance of the right of way of the W. & A. R. R. and if I should be able to place the line along the highway and take the old one off the right of way of the railroad.

I don't profess to be an expert in the construction of a telegraph

line, but I think I could accomplish it from three to six months. [fol. 383] Without any reference to deeds at all the W. & A. R. R. has gone for railroad purposes in ditching and clearing and cleaning up the right of way for its track and structure and keeping the right of way clear of weeds. The average width is generally about 33 feet and we generally keep clear 33 feet on each side, from the center of the track.

That has been done since my connection, to my recollection.

Recross-examination :

Q. During all that time, so far as your knowledge goes, and as far back as your knowledge goes, the W. & A. R. R. has occupied or used this right of way, of which you speak to your knowledge, there has always been the W. U. Tel. Co. lines situated along that same right of way, constructed and maintained and operated and used by the W. U. Tel. Co. and substantially as it is today?

A. Not substantially as it is today.

Q. With what difference?

A. Up to a short time ago the W. U. Tel. operated a line of poles along both sides of the road with one or two exceptions through towns and through tunnels but of late years the N. C. & St. L. has acquired one line of the W. U. the one on the east side and now the W. U. operates only a line on the west side.

The two lines I speak of were there as long back as I can remember, and the two lines, the one now acquired by the N. C. & St. L. and the other now owned by the W. U. they are now located substantially as they have been all the time since I have known them; and the W. U. has been the one which has operated, maintained constructed and reconstructed, so far as my knowledge goes, the lines which the Western is now occupying and which are the subject matter of this suit.

[fol. 384] Q. Of course, your answer to Mr. Peeples, that if you were going to lay out a telegraph line from Chattanooga to Atlanta by the removal of this Western Union Tel. line and place it on a right of way near by, though you say you are not an expert, your thought was it would take three to six months. Suppose you were called on today, Mr. McDonald, to obtain a right of way along the W. & A. from Chattanooga to Atlanta and adjacent to it, under conditions, along that right of way that prevail today and you were confronted with the need to get a right of way or take some action to get one to locate the poles somewhere adjacent how much time would you ask if you were told to do it?

A. I don't know that I would ask for any time unless the company put a time limit on it.

Q. Suppose the company told you—we want you to do it, it is important for us to know how long it will take you to do it what would you say?

A. If they wanted me to make an estimate on it, I would say about 12 months to acquire the right of and move it. I would not ask any less time, unless I had authority to go and condemn the line



and then I would go on the property, go on and go to work and let the condemnation proceedings follow, and in that case I would not ask for more than 6 months. If I had that right of procedure I would go on the property and go to work. In the face of condemnation suit I would go on and let that come afterwards, the condemnation would not interfere with the building of the line, I would go on and build the line.

Q. Wouldn't you have to institute suit and get a trial and award before you could go on?

A. I don't know much about condemnation proceedings.

---

[fol. 385] R. R. HOBBS, a witness for plaintiffs, testified:

Direct examination:

I am in the telegraph branch of the railroad service. I am at present superintendent of telegraph of the L. & N. R. R. and the N. C. & St. L. Ry. I have held the position of superintendent of telegraph of the L. & N. since 1912, and I have been superintendent of telegraph of the N. C. & St. L. Ry. since 1918. Prior to the time I became superintendent of telegraph of those roads I was holding the title of chief operator of the L. & N. R. R. I held that for a period of about six years or eight years previous to my appointment of superintendent of telegraph, during which time I had practically the same duties as I had after the appointment. Before I became chief operator I was manager of the telegraph offices, train dispatcher and telegraph operator. I have been in the telegraph service for about thirty years. My duties since I have been superintendent of telegraph, and a short time before, had been the construction, maintenance and operation of telegraph and telephone lines for the railroads and which included supervision of the service, including telegraph service of all kinds.

Q. Mr. Hobbs, assuming that the Western Union Tel. Co. is upon the right of way of the Western & Atlantic R. R. between Atlanta and Chattanooga, beginning say about two miles from the center of the city of Atlanta, and extending to about mile post 7, near Chattanooga and running generally on the left hand side of the main track of the W. & A. R. R. looking towards Chattanooga, and at a few places crossing over and extending for a short distance on the other side and then returning—I want to ask you what would be a reasonable time to allow for removal of the poles and wires of the [fol. 386] telegraph company? I will ask you, if you know, in a general way, what poles and wires there are?

A. I know in a general way, but not in detail, I have charge of so much territory, I have just a general knowledge of that section. I can answer you, in this way: I can relieve you of that in this way, if you like; I have traveled over that line on a motor car some two years ago for the purpose of inspecting along the line in question



of one on the opposite side, but in my trip I paid some little attention to the line now under discussion, and I have passed over the line once or twice on passenger trains, so that I have a general knowledge.

Q. Now, assuming that the W. U. Tel. Co. has a line of poles and wires extending as I have stated, one main line, one main pole line telegraph—consisting of poles averaging about twenty two feet from the nearest rail of the main line track of the railroad, and being about forty five poles to the mile, averaging about 45 poles to the mile, and being about 17 feet apart, as far as from here to Kingston, and then from Kingston about thirty (30) poles to the mile, averaging about 176 feet apart, from Kingston to Chattanooga, with cross arms about eight feet long, near the tops of the poles, and about six wires to the cross arm, being in the neighborhood of thirty wires and some of the poles having from 1 to several guy wires, what do you say would be a reasonable time to allow for the removal of the wires from the right of way?

A. The line you have described is about the average W. U. pole line, and similar to what I had reference to, when I said I knew it in a general way. I would say, not to make a removal of that line but to take it down and salvage it, would consume about three months, approximately to take it down and salvage the line.

Q. Are you familiar with the extent of inconvenience or detriment [fol. 387] as to the use of the right of way of the railroad? Take one which is 33 feet wide on each side of the main line, and one side of which is occupied by the poles and wires of a telegraph company, if you are, I will get you to give us a statement as to the extent of it?

A. Is the question in general, or in that section?

Q. Well, it is both, now so far as being general, and as far as it is in general applicable generally, I would be glad for you to state it that way? If it relates to some peculiar condition and some peculiar part of the country, you are not familiar with, I would ask you to undertake to testify about it?

A. So far as the railroad business is concerned, the principal interference it might be called, in having a pole line on the right of way, is as to the difficulty of removal, without control of the pole line, when it is necessary to make removal. Now, to explain that statement, I am called upon by a department of the railroad to handle matters pertaining to the removal of pole lines from certain sections of the right of way, when it becomes necessary to use that right of way for any purpose at all, and it is then up to me to correspond with the W. U. Tel. Co. or any other company, which is occupying the right of way, and while the Telegraph Co. itself has been prompt in most cases, there have been cases when it was difficult to get the poles removed in time to prevent complaint from the road department.

Now, there is one other inconvenience that is rather general, where there are storms and those poles being blown down across the right of way and cross the track. Suppose those poles are located, some of them are located within a few feet, say 8 to 12 feet or 14 feet of the track, if blown down would fall across the track, if leaning in that direction.

[fol. 388] There is no interference that I found with our drains and ditches by the guy wires being attached in the ditches. Not to my personal knowledge. I don't know of the guy wires occupying the drains or ditches or interfering with them—not to my personal knowledge. Where the right of way is occupied by the guy lines, poles and wires of some company other than the railroad company, the owner of the poles exercise the dominion as to entry on the right of way as to looking after those lines, wires and poles and keeping up of those poles and lines.

Q. I will ask you whether that has been found to be in your experience, a matter of *my* inconvenience or matter of detriment or not?

A. That is slightly out of my line of work, Mr. Peeples. I don't know of any detriment specially that I know of, the employees being on the right of way personally.

Cross-examination :

This line along the right of way of the W. & A. R. R. from Atlanta to Chattanooga, or on the left hand side going north, which is the Western Union Line—I had observed that two years ago when I was making an inspection of the line and an examination of the telegraph line particularly on the other side. I have since observed it from the train. The telegraph line of the Western Union on the western side or left hand side, going north, being the present Western Union line is the ordinary telegraph line. As it appeared to me, constructed in the same way and located in the same way as telegraph lines are generally located along railroads. I know of some railroads which is itself the owner of a pole line, either of telegraph or telephone lines along its railroad. The Louisville and Nashville, and N. C. & St. L. Ry., and I believe the Pennsylvania. I am not sure as to that. The N. C. & St. L. Ry. and the L. & N. have each constructed recently telegraph lines along their railroads, and those telegraph lines that those two railroads have constructed along their railroads are practically the same in construction and in location to the telegraph line of the W. U. between here and Chattanooga.

I spoke of the matter of objection to the use, or impairment of the use of the railroad right of way in the event a foreign line was established along on and using the right of way.

Identically the same impairment or objection would occur to the use by telegraph poles so far as the railroad operation was concerned, whether the telegraph line was constructed and owned by the railroad or by the third party like the telegraph company, with the exception that it is under its control.

The only exception is where the telegraph line was owned by the railroad company and the railroad company could the more expeditiously get the poles removed if, in any event, it became necessary, than if the poles were owned by the Western Union? By a company over which the railroad had no control.

When the Western Union poles were in the way, during my experience, they were ordinarily very prompt in giving all possible

assistance and speedy assistance by it, to the railroad in helping to remove them, or otherwise. I have a case in mind, if I may be allowed to state, where the telegraph company was seriously at fault. On the Kentucky division of the Louisville and Nashville R. R. that is one case where I happened to know about where the railroad contractors were about to do some grading, and ready to do some work, grading I think and on account of the failure of the telegraph company to remove those poles in a reasonable time and caused delay the cost to the railroad company was something like \$450 in that [fol. 390] case. I don't know what became of the case, and I don't know what excuse the telegraph company had for the delay and not doing it. I don't know the circumstances.

Q. Is that the only case you know of?

A. There had been cases complained of by the road department.

Q. I am speaking of something you know about personally?

A. No.

Q. You don't know about them?

A. No.

This large outlay of which I spoke was on the Kentucky division of the L. & N. R. R. I don't recollect between the points. The length of the delay from the time they received the order or request to remove and the time they did remove was I think about three months. I have not got the details with me. You asked me for an example and I am trying to give you as much as I can of it.

Q. You spoke of poles falling, when poles fall they are partly supported by the wires are they not? Aren't they partly supported by the wires?

A. That depends on the direction of the fall; if they fall on the inside of the curve they are not supported by the wires unless they are guyed; and they ordinarily are guyed for that purpose. I mean by "guy" wires run down from the top of the pole, and run down into the ground to hold and prevent the strain. I know what you mean, but I can't answer you further without your question. I do not know of any instance between Atlanta & Chattanooga, along the W. & A. R. R. where there has been a request to remove poles, a delay or non-compliance when the railroad company requested the Telegraph Company to remove some poles or wires in that territory. I do not know of any instance between here and Chattanooga where any poles have fallen on the track along the W. & A. R. — I think it would take them three months to remove [fol. 391] the telegraph line of the Western Union off the right of way from here to Chattanooga from the time they actually started to remove. If I was notified today to remove that line ourselves and was to remove it regardless of damages, I would have the line down in ten days, but if I had instructions to salvage the line, to take it down in such position and such shape it could be put up again, a reasonable amount of poles saved and wires saved, I would want three months from the time I got on the ground. I would not go on the

ground and actually start to move until I had prepared everything to enable me to move to another place.

Q. Now, how long a time would it take you before you actually started to remove the poles, to make your arrangements that you would have to make in order to make a removal?

A. That is a question that cannot be answered. I would have to secure some other place to put the line. Or, I would have to rent space. There is no way to determine how long it would take to secure the right of way. I would probably try to rent space from somebody else as a temporary arrangement, until I could make permanent arrangements for a pole line of my own. It would be problematical, if I were told to remove it and set about to remove—how long would it take to get the necessary rights to enable me to remove that pole line. Absolutely—it would depend on how you went about it, very largely, and what arrangements had already been made.

#### Redirect examination:

Q. Mr. Hoobs, one other question I want to ask you and that is relative to the location of the poles themselves of the W. U. line on the right of way of the W. & A. R. R. and the railroad's own line, as to the location of the poles, you said, as I understood you, they were in the same general location, do you mean they are the same [fol. 392] distance from the main line—main track.

A. I mean that generally they are. Generally they are. It is the purpose to locate a pole as far away from the track as it can be located except in extraordinary circumstances, but not in falling distance, what we call distance, when it can be avoided, that falling distance is the height of the pole above ground plus five feet. The average height of the poles is twenty five feet.

#### Recross-examination:

I am speaking now of the two poles lines. We got this pole line on the right hand side going to Chattanooga about two years ago when I made that examination. The pole line on the right hand side or eastern side, goin to Chattanooga, is in a general way located from the track the same distance as the pole line on the western side. Since the N. C. & St. L. Ry. has acquired that pole line on the eastern side, that pole line has continuously remained where it was when the N. C. & St. L. bought it, except in some sections where it has been removed; but generally speaking in the main it stays and has remained where it was at first when we got it.

#### EXHIBITS IN EVIDENCE

The plaintiffs introduced in evidence and read portions of the original answer in this cause, and of the first amendment thereto, to wit:

From paragraph I of original answer:

"Defendant admits that under and by virtue of an act of the general assembly of Ga., entitled 'An act to authorize the construction of a railroad communication from the Tennessee line, near the Tennessee river to the point on the southeastern bank of the Chattahoochee river, most eligible for the running of branch roads, thence to Athens, Madison, Milledgeville, Forsyth and Columbus; and to appropriate moneys therefor' approved December 21st, 1836, and the several act- amendatory thereof, the State of Ga. constructed [fol. 392½] 'a railroad communication' known as the W. & A. R. R. extending from the City of Atlanta in the State of Ga. through the counties of Fulton, Cobb, Bartow, Gordon, Whitfield and Catoosa, in the State of Ga., and the county of Hamilton in the State of Tennessee, to the city of Chattanooga, Tenn., defendant admits that the said Western & A. R. R. was constructed out of public funds."

From paragraph I of original answer:

"Defendant admits that the State of Ga. is the owner of said W. & A. R. R. and of said easements or rights of way necessary therefor."

From paragraph II of original answer:

"Defendant admits that the N. C. & St. L. Ry. a corporation of the State of Tenn., pursuant to, and under the terms and provisions of, an act of the general assembly of Ga. approved Nov. 30th, 1915, and the acts amendatory thereof, entered into a lease contract with the State of Ga. under which it became a body politic and corporate under the laws of Ga., under the name and style of the W. & A. R. R. (hereinafter sometimes referred to as the present lessee), and under said lease contract became the lessee of the said W. & A. R. R."

From paragraph IV of original answer:

"Defendant admits that the W. & A. R. R. was until the 27th day of December, 1870, operated by the State of Ga., in the manner and upon the conditions set forth in the foregoing acts."

From paragraph IV of original answer:

"Defendant admits that, pursuant to an act of the general assembly of Ga., approved Oct. 24th, 1870 (acts of 1870, page 423) the W. & A. R. R. was leased to a corporation known as the W. & A. R. R. Corporation for a term of twenty years."

From paragraph IV of original answer:

[fol. 393] "Defendant admits that, pursuant to an act of the general assembly of Ga., approved November 12th, 1889 (acts 1889, page 362) the W. & A. R. R. was for a term of twenty years beginning Dec. 27, 1890, leased to the N. C. & St. L. Ry. which by

virtue of said act and lease then became a corporation under the law of Ga., under the name and style of the W. & A. R. R. Company.

From paragraph V of original answer:

"Answering the allegations of paragraph 5 of the petition this defendant admits that pursuant to an act of the general assembly of Ga. approved Nov. 30th, 1915, and the amendments thereto, the W. & A. R. R. was leased for a term of 50 years beginning Dec. 27, 1919, to the N. C. & St. L. Ry., which under the provisions of said act and as said lessee became a corporation for the State of Ga., under the name and style of W. & A. R. R."

From paragraph VI of original answer:

"Answering the allegations of the 6th paragraph of the petition this defendant admits that it is maintaining and operating over, upon or along what is known as the right of way of the W. & A. R. R. between the city of Atlanta, Ga., and the city of Chattanooga, Tenn., telegraph lines, poles, wires and other appurtenances owned, possessed and employed by it in the conduct of its telegraph business."

From paragraph VI of original answer:

"The said lines of telegraph and said easements and interests in land are situate upon or along the said W. & A. R. R. and its right of way, and may be generally described as follows:

"One (1) main line of telegraph commencing in Fulton county, Ga., at or near the terminus of the W. & A. R. R. in Atlanta, Ga. on the western or left hand side going north of said right of way, and extending thence northwardly upon and along said western [fol. 394] side of said right of way to a point about 1947 feet north of mile post C-133; thence crossing over said right of way and railroad tracks to the eastern or right hand side going north of said right of way; thence extending northwardly upon or along the eastern or right hand side going north to a point about 8 feet north of mile post C-132; thence crossing over the said right of way and railroad tracks to the western or left hand side going north of said right of way, thence extending northwardly upon or along the western or left hand side going north of said right of way to a point about 875 feet north mile post C-39, thence crossing the railroad tracks and right of way of the W. & A. R. R. to the eastern or right hand side going north of said right of way, thence northwardly upon or along the eastern or right hand side going north of said right of way to a point about 4,081 feet south of mile post C-38; thence crossing said right of way and railroad tracks to the western or left hand side going north of said right of way; thence northwardly upon or along the western or left hand side going north of said right of way to a point about 1,819 feet north of mile post C-7; thence crossing said right of way and railroad tracks to the eastern or right hand side going north of said right of way; thence



upon or along the eastern or right hand side going north of said right of way and east of the tracks of the Cincinnati, New Orleans & Texas Pacific R. R. and in a general way paralleling said last named railroad tracks northwardly upon and along the eastern or right hand side going north of said right of way, and across said right of way and railroad tracks of the W. & A. R. R. and entirely across said right of way, near and just beyond where the line of tracks of the C. N. O. & T. P. R. R. crosses said right of way at or near Chattanooga, Tenn., with the following pole lines branching out from the above described main line, to wit:

[fol. 395] "(a) A pole line of telegraph extending from said main line of telegraph at a point about 1,915 feet north of mile post C-113 thence westwardly and northwestwardly along the line of the Southern R. R. tracks across and through said right of way.

"(b) A poles line of telegraph extending from said main line of telegraph at or near Elizabeth Junction thence eastwardly across through and over said right of way and railroad tracks and along the line of the L. & N. R. R. which goes to Blue Ridge.

"(c) A pole line of telegraph extending from said main line of telegraph near Phelps and thence extending southwestwardly across and through said right of way and along the line of the tracks of the Southern Ry.

"(d) A pole line of telegraph extending from said main line to telegraph at a point about 3,707 feet south of mile post C-38, thence northeastwardly along the line of the tracks of Southern Ry. across and through said right of way.

"(e) A pole line of telegraph extending from said main line of telegraph at a point about 1,819 feet north of mile post C-7, thence northeastwardly through and across said right of way along the line of the tracks of the C. N. O. & T. P. R. R.

"(f) A pole line of telegraph extending from said main line of telegraph near the Citico Test House of the W. U. Tel. Co., near the tracks of the Southern Ry., thence southwestwardly across through and over said right of way and railroad tracks nearly parallel with the railroad tracks of the Southern Ry.

"Said main pole line of telegraph consists of poles securely and permanently planted or embedded in and affixed to the land, and may be generally described as follows, to wit:

[fol. 396] "One (1) pole line of telegraph upon or along the said W. & A. R. R. and its right of way, consisting of poles situate on the average about twenty two (22) feet from the nearest rail of the main line track of the W. & A. R. R. the distance of said poles from said tracks varying from approximately fourteen (14) feet to thirty-five (35) feet, there being about forty-five (45) poles per mile, averaging about one hundred and seventeen (117) feet apart between the initial point of said pole line of telegraph in Fulton County, Ga. and Kingston in Bartow county, Ga., and there being about thirty (30) poles per mile averaging about one hundred and seventy six (176) feet apart from Kingston, Ga., to Chattanooga, Tenn., with cross arms about eight (8) feet long at or near the top



of said poles supporting and sustaining thereon wires, the number of telegraph wires so supported varying from about six (6) wires to thirty (30) wires, the number of cross arms varying from one (1) to six (6).

"Where the line of said railway is straight, the poles of defendant telegraph lines are perpendicularly set in the ground, but at curves the poles are placed in the ground in a slanting or inclined position in such manner that the top of the pole is farthest removed from the center of curvature, and to offset the strain incident of the curvature, the poles are sustained or reenforced by guy or stay wires, one end of which is securely fastened to the pole near its top and the other end is securely fastened to a post or other anchor securely fixed in the ground and about seven (7) feet more distant from the center of curvature than the bottom of the pole, the distance of such post or anchor from the bottom of the pole is as a rule at least one fourth ( $\frac{1}{4}$ ) the length of the pole above ground.

"At places of curvature poles are also strengthened, braced or [fol. 397] reenforced by wooden braces, one end of which is securely fastened to the pole near the top and the other end is securely embedded or planted in the ground about seven (7) feet nearer the center of curvature than the base of the pole.

"Poles are sometimes sustained, reenforced or strengthened by both guy or stays wires and braces of the character above mentioned and sometimes by one of such braces, supports or reenforcements without the other.

"Certain poles are also strengthened or reenforced by what are termed storm or head guys or stays, being braces, guys or stays of the character above mentioned fastened at the base or posts or other anchors in the ground and at the same distance generally from the center of curvature (or track if straight) as the base of the pole but placed at distances from the pole to which the other end of the brace, stay or guy is attached dependent upon the amount of possible strain to which the pole may be subject, the anchor being at times forty (40) feet or more from the base of the pole supported or reenforced by the guy or braces.

"From the northern terminus, to the southern terminus of said telegraph lines upon or along said right of way, there are on the average about seven (7) poles per mile in each of said line of poles, braced, reenforced or stayed in the manner above mentioned."

From paragraph VI of original answer:

"The mile posts above mentioned are those of the W. & A. R. R. giving the distance from Chattanooga."

From paragraph VI of original answer:

"This defendant admits that its use and occupation of said right of way, and the possession, maintenance and operation of said lines of telegraph and of said easements necessary and useful there-[fol. 398] for, is contrary to the will and consent of the N. C. & St. L. Ry. both as a corporation under the law of the State of Tenn.,

and as lessee of said Ry., and a corporation of the State of Ga., under the name and style of W. & A. R. R."

From paragraph VIII of original answer:

"Defendant admits that the general assembly of the State of Ga. passed an act entitled 'An act to provide for the leasing or other disposition of the W. & A. R. R. and its properties for the creation of a commission to effectuate such purpose and to define its powers and duties; making an appropriation for the cost of the work required, and for other purposes,' which was approved Nov. 30th, 1915.

"Said act created a commission authorized and empowered to lease and contract for the leasing of the railroad properties known as the W. & A. R. R. including the terminals thereof, and its property other than its railroad property not connected with either of its terminals; directed said commission to make a report to include 'a full and complete inventory of all personal property, rolling stock, equipment, supplies, tools, etc., to be included in the lease as received from the present lessee;' directed the commission to consider and determine among other things.

"7. What, if any, property is owned by the W. & A. R. R. not useful for railroad purposes, that could be properly and advantageously disposed of separately from the lease of the road.

"8. What, if any, steps should be taken to assert the right and title of the State to any part of the right of way or properties of the road that may be adversely used and occupied."

"And required the commission to cause to be prepared, if not otherwise obtainable, complete and accurate surveys, copies profiles and easements showing:

[fol. 399] "2. The extent and character of every use or occupation of the right of way, tracks and other properties of the road by any person or corporation other than the lessee and the authority therefor.

"3. The properties not used or apparently not useful for railroad purposes, with an estimate of the market value of such properties, and the use to which they might be applied."

"Said commission was by said act further instructed and directed to prepare bills for presentation to the general assembly to carry into effect any recommendation which it might make 'with respect to what steps should be taken to assert the right and title of the State to any part of the right of way or any part of the road that may be adversely used or occupied; and with respect to any other recommendation which, in its opinion, and which may require legislation by the general assembly of Ga. to fully, completely and adequately protect all the interests of the State of Ga., in regard to said road and all of its parts and properties, whether reckoned as surface, overhead or underground rights."

"Defendant admits that the general assembly of Ga. amended the last mentioned act by the adoption of an act entitled 'An act to amend an act approved Nov. 30th, 1915, providing for the leasing or other disposition of the W. & A. R. R. and its properties, and for the creation of a commission to effectuate such purpose, and for other purposes by adding thereto other provisions further defining

the powers and duties of the said commission, and for other purposes,' approved August 4th, 1916.

"The amendment last mentioned contains language purporting to give the commission created by the said act of Nov. 30th, 1915, full power and authority in its discretion to deal with and dispose of [fol. 400] any and all encroachments upon, and use and occupations of, any part of the right of way and properties of the W. & A. R. R. by any person other than the lessee under said act, its tenants and licensees whether such encroachments, use or occupancy be permissive or adverse, and whether with or without claim of right therefor; to determine whether such encroachments, uses and occupations or any of them shall be removed and discontinued, or whether they or any of them shall be permitted to remain, and if so to what extent and upon what terms and conditions, with further authority to adjust, settle and finally dispose of any and all controversies that may exist or that may arise with respect to any adverse use or occupancy of any part of said right of way and properties of the W. & A. R. R. in such manner and upon such terms and conditions as said commission may deem the best interest of the State require, and provides that all contracts and agreements made or entered into by said commission in settlement or disposition of matters touching such adverse uses and occupations shall be binding upon the State of Ga., and further authorizing and empowering said commission to take such action as it might deem proper and expedient to cause the removal and discontinuance of any encroachment, use or occupancy of said right of way and properties which in its opinion should be removed or discontinued and to that end the commission was authorized and empowered to institute and prosecute in the name and behalf of the State of Ga., such suits and other legal proceedings as it might deem appropriate in protection of the State's interest or the assertion of the State's title.

"Defendant admits that the present lease contract contains in it a reservation of a claim right to remove or to cause to be discontinued any and all encroachments and other adverse uses and occupancies in and upon the right of way of the W. & A. R. R. whether maintained [fol. 401] under any claim of lawful right or not, and that to that end the N. C. & St. L. Ry. consented to the withholding of delivery of possession or right to possession of such portions of said properties, rights of way as may be so adversely used and occupied until encroachments and other adverse uses and occupancies had been discontinued; with the further provision therein that the State of Ga. remove such encroachments uses and occupancies in its own name may at its option in such manner as it may deem best proceed to and as the owner of the properties, and that to such proceedings the N. C. & St. L. Ry. would become a party. For the exact and complete terms of said lease, defendant refers to the lease itself and requires proof thereof."

From paragraph XV of first amendment to answer:

"Answering the 6th paragraph of the petition, defendant admits that it is maintaining and operating along the W. & A. R. R. between

the City of Atlanta, Ga., and the City of Chattanooga, Tenn., telegraph lines, poles, wires and other appurtenances employed by it in the conduct of its telegraph business, the location of which is generally described in defendant's original answer."

Plaintiff introduced in evidence the following portions of the record in the case of *W. & A. R. R. Co. v. W. U. Tel. Co.*, No. 24720, Fulton superior court, the petition in which was filed on the 1st day of February, 1912; and the answer was filed on the 5th day of March, 1912, to wit:

Paragraph 6 of the petition in said case No. 24720:

"In the year 1884, a contract was entered into between the W. U. Tel. Co. and the N. C. & St. L. Ry., and other railroad companies, for themselves and for any branch or branches that might be constructed by them, respectively, or other railroad or railroads that might be acquired by them respectively, either by lease or purchase [fol. 402] thereof. This contract, by its provisions, was to continue in force for and during the term of twenty-five years from the first day of July, 1884, and thereafter, until the expiration of one year after written notice should be given by either party thereto to the other of a desire and intention to terminate the same. Under the terms of this contract it was provided, among other things, that petitioner should transport free of charge and distribute along its road at the points required, all poles, wires, insulators and other material of the telegraph company, for use in the construction maintenance and repair and operation of the said telegraph lines on said roads; and also to transport free of charge all poles and other materials for the use of said telegraph company on the railroad lines, with certain limitations and restrictions not necessary to be herein set out.

The railroad companies bound themselves, also, by said contract, to furnish on the request of the superintendent or foreman of the telegraph company, all the unskilled labor necessary for the maintenance and ordinary current repairs of defendant's line of telegraph on the railroads, said repairs to include the necessary renewal of poles, not to exceed an average of one new pole for every mile of road operated by the railroad concerned in any one year. For general reconstruction and renewal of poles defendant bound itself to supply labor, the railroad concerned to furnish the transportation and distribution of the material. Defendant obligated itself to furnish all material and necessary line repairers for the maintenance, repair and reconstruction of its lines and wires and competent foreman to direct the labor. It was also agreed that one wire should be set apart for the preferential use of the railroad concerned along the entire length of the road, except on branch roads where only one [fol. 403] wire would be maintained and on such latter wire the important business of the railroad company should have precedence. It was also agreed that if at any time the railroad concerned should require greater wire facilities than the wire above mentioned, defendant would furnish an additional wire at the cost price thereof

upon the poles already constructed and that the railroad concerned, at its own cost, would string such additional wires."

Paragraph 6 of the answer in said case No. 24720:

"Answering paragraph 6 of said petition, defendant says that the allegations thereof are substantially correct, but asks that the contract itself be referred to for the exact terms thereof."

Paragraph 7 of the petition in said case No. 24720:

"Paragraph 7. In August 1911 defendant gave notice that its said contract with petitioner would terminate, under the provisions of the contract, one year from the date said notice was received by petitioner, and under the provisions of said notice said contract will terminate on August 17th, 1912."

Paragraph 7 of the answer in said case No. 24720:

"Defendant admits that allegations of paragraph 7 of the petition."

Paragraph 8 of the petition in said case No. 24720:

Par. 8. The defendant has addressed to your petitioner a paper, copy of which is hereto attached, except the blue print or plat referred to therein, copy of which is not necessary to be here exhibited. Marked Exhibit "A" in which it seeks to notify petitioner that it, the defendant, proposes to condemn so much of the right of way of petitioner as may be necessary for the use of defendant for the purpose of constructing, maintaining and operating a telegraph line along and upon such right of way between Atlanta, Ga., and the line of the State of Tenn., and also on what it styles the "Rome [fol. 404] branch," of petitioner between Kingston, Ga., through the counties of Bartow, and Floyd, to Rome, Ga., a distance of approximately 18.1 miles. In said notice defendant seeks to notify petitioner that it has appointed W. G. Humphrey as its assessor to meet with the assessor to be appointed on petitioner's behalf and such third assessor as shall be legally selected, in the office of the ordinary of Fulton county, Ga., on the 5th day of Feby., 1912, for the purpose of appraising the value of said right of way, interests, and easements, and consequential damages, if any, and requesting petitioner to select an assessor."

Par. 8 of answer:

"8. In answer to the allegations of paragraph 8 of said petition, defendant admits that it has instituted condemnation proceedings against petitioner substantially as averred in said paragraph."

Par. 9 of petition:

9. "As will be observed by reference to said exhibit the defendant proposes to condemn the right of way held by petitioner under said

lease from the State of Ga. upon the east side of its main line tracks from the Marietta Street bridge in Atlanta to Howells Yard in Fulton county, Ga. then to cross the tracks and continue on the west side thereof to the north end of Hills Park in said county, and then to cross the tracks and continue on the east side thereof to the 6 mile post of the railroad, and at said point to divide and a part of the line to cross to the west side of said tracks, and from said 6 mile post to the Tennessee State line to be and extend on both sides of said tracks as now located, except at certain points specified in said notice and not material to be here repeated. Under said proposed condemnation proceedings, as shown in said notice, it is designed [fol. 405] and intended to condemn the right of way of your petitioner under said lease for and during the term extending to the expiration of said lease, for approximately the whole distance from Atlanta, Ga. to the Tennessee State line, on both sides of petitioner's railroad, with lines of poles and wires placed at an average distance from the main line track of 27 feet, with a minimum distance from the edge of the right of way of 6 feet, and to occupy substantially the portions of the right of way now occupied by the lines of poles and wires, and it is further proposed and sought to have wires crossing the tracks of petitioner from the main telegraph lines at all the stations of your petitioner from Atlanta to Graysville, Ga."

Par. 9 of answer:

"9. Defendant admits that it proposes to condemn the right of way held by petitioner under said lease from the State of Ga. as will appear from examination of its condemnation notice. While it has not compared the exhibit attached to said petition, it presumes the same is correct, but asks leave, wherever material to refer to said original condemnation notice."

Par. 11 of petition:

"11. Petitioner further shows that its right of way so leased is of the width of only 33 feet from the center of its main line and upon each side of said center, and that the portion of the right of way sought to be condemned and now occupied by defendant with the poles and wires strung thereon, is at the average distance of 27 feet from said main line and of 6 feet from the edge of the right of way, upon both sides of its main line, from said 6 mile post to the Tennessee State line."

Par. 11 of answer:

"11. Answering paragraph 11 of said petition, this defendant avers on information and belief that the allegations thereof are substantially correct." [fol. 406]

A portion of par. 17 of petition:

"17. Petitioner shows to the court that said right of way is the property of the State of Ga. held by this petitioner under said lease."



A portion of par. 17 of the answer:

"17. This defendant admits that said right of way is the property of the State of Ga. that it is held by petitioner under lease."

A portion of par. 20 of answer:

"20. Answering paragraph 20 of said petition, defendant alleges that it is necessary for it, in the carrying on of its business, to condemn the portion of the right of way set out in its notice."

---

Exhibit "A" attached to petition and referred to in paragraph 8 thereof:

#### EXHIBIT "A" IN EVIDENCE

"To the Western & Atlantic Railroad Company:

"You are hereby notified that the Western Union Telegraph Company, a corporation existing under the laws of the State of New York, but doing business in the State of Georgia, and having complied with the laws of the State of Georgia, and being authorized, under said laws, to condemn so much of the right of way of a railroad company as may be necessary for its use for the purpose of constructing, maintaining and operating its telegraph line along and upon such right of way, and having been unable to agree with you upon just and adequate compensation for the right of way and easements sought to be acquired, proposes and intends to acquire from you by condemnation, upon the payment of just and adequate compensation therefor, along the right of way of your railroads in Georgia, a right of way upon which to construct (when necessary), maintain and operate its telegraph line.

[fol. 407] "The location of the right of way sought to be acquired is substantially that location now occupied by the telegraph line of the Western Union Telegraph Company along main line of your railroad from Atlanta, Ga., to the Tennessee line at or near Graysville, Ga., and along the branch line known as the Rome branch.

"Said location is more specifically defined as follows:

#### "Main Line

"This line runs from Atlanta, Ga., to the Tennessee State line at or near Graysville, Ga., through the counties of Fulton, Cobb, Bartow, Gordon, Whitfield and Catoosa, a distance of approximately 121.37.

"Said telegraph line will enter upon the right of way of your railroad at Marietta street bridge at the same point where it now enters upon your right of way on the east side of your main line tracks, and will continue on the east side of your tracks for a distance of forty-five poles to the north end of Howell's Yard, a point 110 feet north of the 3rd mile post. At this point said line will cross your tracks, and



continue on the west side of the tracks 110 poles to the north end of Bills Park, at a point 1905 feet north of the 5th mile post. At this point said line will cross your tracks and continue on the east side of said tracks 32 poles to the 5th mile post, at which point said line will divide, and part of said line cross to the west side of said railroad tracks. From the 6th mile post to the Tennessee State line, said line will extend on both sides of said tracks as now located, except at the following points:

"At Marietta, the wires on the east side of the track will cross to the westside at a point 690 feet south of the present passenger depot at Marietta, and run along with wires on the west side for a distance [fol. 408] of 94 poles, as now located, said east wires crossing back to the east side at a point 2150 feet north of the 22d mile post.

"At Adairsville, the wires on the east side of the track will cross over to the west side of the track at a point 1638 feet south of the passenger depot, and extend along with wires on the west side for a distance of 20 poles, as now located, to a point 1285 feet north of the passenger depot at Adairsville, at which point said wires will cross back to the east side of track.

"At Dalton, Ga. the wires on the east side of the track will cross over to west side of tract at a point 742 feet south of 99th mile post, and extend along the west side to a point 225 feet south of passenger depot, where they will cross to the east side, and extend along the east side to a point 600 feet north of passenger depot, where they will cross to the west side and extend along the west side to a point 1,000 feet from passenger depot, where they will return to the east side.

"Over the tunnel near Tunnel Hill, said wires will consolidate, extending over the tunnel, as now located.

"The right of way thus sought to be acquired by the Western Union Telegraph Company shall be of sufficient width to enable it to conveniently construct (when necessary) maintain and operate its line located and constructed substantially as follows:

"As many wires or cables of wire as may be necessary from time to time to transact the business of said company. These wires or cables are to be strung on poles placed at an average distance from the center of your present main line track of twenty-seven (27) feet, except where your right of way is limited or widened, with a minimum distance from edge of right of way (except where right of way is limited or widened) of six (6) feet. The poles shall have a [fol. 409] length of not less than twenty (20) feet, and shall be placed in the ground a depth of not less than four (4) feet, and have a circumference of about thirty (30) inches at the bases and twenty (20) inches at the top. At highways, railway crossings, depots and side tracks, said poles shall have a height of from twenty-five (25) to forty (40) feet above the ground. There will be an average of forty (40) poles per mile on said telegraph line on both sides of said tracks from Atlanta, Ga., to Kingston, Ga., and of thirty (30) poles per mile from Kingston, Ga., to the Tennessee line. Said poles will nowhere be placed upon any of the embankments or in the cuts of your railway, nor will said wires be attached or fastened to any of the bridges or trestle work of said railway.

"In order to reach the offices of the Western Union Telegraph Company as now located or to be established by it, there will be wire crossing the tracks of your railroad from the main telegraph line, with one or more poles on the right of way of your railroad, at the following points: Bolton, Marietta, Emerson, Kingston, Vinings, Kennesaw, Cartersville, Adairsville, Smyrna, Acworth, Rodgers, Calhoun, Resaca, Dalton, Tunnel Hill, Ringgold and Graysville.

"At all points where said telegraph wires will cross your tracks for reaching offices, the lowest wires will be not less than twenty-five (25) feet above the tracks.

"The Western Union Telegraph Company desires the above described right of way for the purposes herein specified, for a term expiring 27th day of December, 1919, said date being the expiration of your lease with the State.

#### "Rome Branch

"Said line to connect with the main line of the Western Union [fol. 410] Telegraph Company at Kingston, and extend thence in a westerly direction, extending along the north side of your track from Kingston to the Southern Railway crossing, crossing, your tracks at this point to the south side, and thence extending along the south side of your tracks, through the counties of Bartow and Floyd, a distance of approximately 18.10 miles, to a point about 250 feet from your passenger depot, at which point said line will cross your tracks, leaving your right of way.

"The right of way thus sought to be acquired by the Western Union Telegraph Company shall be of sufficient width to enable it to conveniently construct (when necessary) maintain and operate its line, located and constructed substantially as follows:

"As many wires or cables of wire as may be necessary from time to time to transact the business of said company. These wires or cables are to be strung on poles placed at a distance varying from 12 to 15 and 20 feet from the center of your main line track, with a minimum distance from edge of right of way of three feet. The poles will be of a length of not less than twenty (20) feet placed in the ground a depth of not less than four (4) feet, and have a circumference of about twenty-six (26) inches at the base and fifteen and one-half (15½) inches at the top. At highway crossings, railroad crossings, depots and side tracks, said poles shall have a height of from twenty-five (25) to thirty-five (35) feet above the ground. There will be an average of thirty (30) poles to the mile between Kingston and Rome. Said poles will nowhere be placed upon any of the embankments or in the cuts of your railway, nor will said wires be attached or fastened to any of the bridges or trestle work of said railway.

"At all points where said telegraph line will cross your tracks, the lowest wire will be not less than twenty-feet above the ground. [fol. 411] "The Western Union Telegraph Company desires the above set forth, and having been unable to agree with you upon term expiring the 27th day of December, 1919, said date being the expiration of your lease.

"A plat is hereto attached, showing in general outline the right of way proposed to be acquired.

"The Western Union Telegraph Company, being unable by contract to procure the right of way and other interests and easements above set forth, and having been unable to agree with you upon the compensation to be paid therefor,

"You are hereby notified that said Western Union Telegraph Company proposes to have such right of way, interests and easements above set forth, and consequential damages resulting to the property from which said right of way, interests and other easements are carved, ascertained by condemnation proceedings, as by law in such cases provided, and has appointed W. G. Humphrey as its assessor to meet with the assessor to be appointed in your behalf, and such third assessor as shall be legally selected, in the office of the ordinary of Fulton county, Georgia, at 11 a. m. o'clock on the 5th day of February, 1912, for the purpose of appraising the value of said right of way, interests and easements above set forth and consequential damages, if any.

"You are hereby requested to select an assessor and to do all other things required of you in the premises in such cases made and provided.

"This 18th day of January, 1912.

"The Western Union Telegraph Company, (Signed) G. W. E. Atkins, Vice-President. Attest: Wm. H. Baker, Secretary. (Seal of the Western Union Telegraph Co.)"

[fol. 412] Par. 4 of amendment to petition:

"4. The contract between plaintiff and defendant, by virtue of which defendant maintained and operated telegraph lines on the rights of way of plaintiff, expired on August 17, 1912, and defendant was notified by plaintiff on August 5, 1912, that on and after August 17, 1912, the use and occupation by defendant of plaintiff's right of way and of its buildings, &c., for a telegraph line, would be without permission of plaintiff and against its will and consent; that defendant was notified to vacate said right of way, etc., and to commence in good faith to do so not later than September 1, 1912, continuously prosecute said work of removal, and complete the same prior to December 1, 1912, and that in default of such vacating prior to December 1, 1912, plaintiff would take possession of the poles, cross arms, batteries, etc., which remained on plaintiff's right of way. But defendant has not even begun such removal, and, in violation of its contract with plaintiff, terminated on said August 17, 1912, persists in remaining on the rights of way and premises of plaintiff, occupying the same locations along said rights of way as before said notice was given."

Par. 4 of answer to said amendment:

"4. In answer to paragraph 4 of said amendment, defendant admits that said contract expired on August 17, 1912, and admits that prior to the expiration thereof plaintiff gave defendant a written

notice to vacate said right of way. Defendant asks that said notice itself be produced into court with the terms thereof. Defendant admits that it has not begun such removal and still occupies the locations along said rights of way that it occupied before said notice was given."

Par. 5 of amendment to petition:

"Plaintiff further shows that no rehearing has yet been had as [fol. 413] to plaintiff's prayer in its original petition for temporary injunction, as directed by the decision of the Supreme Court of Georgia above referred to, but that on or about the 9th day of December, 1912, it was served by defendant with what is styled an "amendment" to defendant's former condemnation notice, in which it is stated that defendant strikes from said condemnation notice so much of the description of the right of way sought and proposed to be condemned as includes a right of way on both sides of the tracks of plaintiff's railroad along the same portion of the right of way, striking from said description the proposed location of a right of way along the right hand side of the railroad going from Atlanta to Chattanooga wherever said description shows a proposed line of telegraph upon the left hand side of the railroad, so that the location of the proposed telegraph right of way of defendant will be substantially as follows: Entering upon the right of way of plaintiff at the Marietta Street Bridge, on the east side of the main line tracks, and continuing on that side a distance of 45 poles to the north end of Howell's Yards, there crossing the tracks and continuing on the west side 110 poles to the north end of Hills Park, there crossing the tracks and continuing on the east side 32 poles to the 6th mile post, there crossing the track and continuing on the west side of the track to the Tennessee State line, except that at Dalton, Ga., the line will cross from the west side to the east side at a point 225 feet south of the passenger depot and will extend along the east side of the tracks to a point 600 feet north of the passenger depot, and at the tunnel near Tunnel Hill, Ga. the line will extend over the top of the hill as now located.

"It is further proposed, in said alleged amendment, that in the event plaintiff desires to build a telegraph line for telegraph purposes [fol. 414] poses in connection with the operation of its railroad, and for the location of such line selects the location, or any part thereof, heretofore selected by defendant, defendant 'agrees' to shift the location of the proposed telegraph line and the desired right of way and to erect its fixtures, poles and wires, and construct, maintain and operate its telegraph line, upon such portion of said right of way and at such distance from the track of the railroad and the railroad's telegraph line for railroad uses, as will not obstruct or interfere with the ordinary use of said right of way for railroad uses, or of the railroad telegraph line for railroad uses. And said so called amendment notified plaintiff to appoint an assessor to meet with an assessor appointed by defendant, and such other assessor as should be legally selected, at the office of the ordinary of Fulton county, Georgia, on

January 2, 1913, for the purpose of appraising the value of the right of way, interests and easements sought to be condemned, and consequential damages, if any."

Par. 5 of answer to said amendment to petition:

"5. In answer to paragraph 5 of said amendment, defendant admits that on or about December 9, 1912, it served petitioner with an amendment to its condemnation notice, a substantial copy of which is attached to said amendment. Defendant prays reference to said amendment for the terms thereof."

Par. 3 of defendant's motion filed Feb. 7, 1912, to advance the hearing.

"3. Defendant is now occupying with its line of telegraph a right of way on the railroad right of way of said petitioner, under a contract which will expire August 17th, 1912."

Par. 5 of defendant's motion to advance the hearing:

[fol. 415] "5. Defendant shows that it is only six months until the contract under which it now occupies the right of way of said petitioner will expire, and that it is very important that the right of defendant to condemn said property, and if adjudged favorably to defendant, the condemnation proceedings in connection therewith, be had and determined by the expiration of said time."

Plaintiffs introduced in evidence the following portions of the record of the suit in Fulton superior court, still pending brought by State of Ga. against the W. U. Tel. Co., known as No. 27274 in Fulton superior court, December 12, 1912, to wit:

Par. 2 of petition in said case No. 27274:

"2. That during the month of August, 1912, there was served upon his excellency, Joseph M. Brown, governor of said State what purports to be a notice by the said W. U. Tel. Co. to the State of Ga. of the desire of said company to acquire a right of way upon which to maintain and operate a telegraph line on the lands composing the right of way of the W. & A. R. R., the property of said State extending from Atlanta, Ga., through the counties of Fulton, Cobb, Bartow, Whitfield and Catoosa to the Tennessee State line, the said company desiring a right of way for its said line 'for a perpetual term' the said company in said notice attempts to offer the State of Ga. the sum of \$5 per mile for the right of way to be so occupied, and request in the notice that it be advised on or before the 8th day of August, 1912, if this sum is acceptable and advises that failure to make response within that time will be treated by the company as a refusal of its offer and that it will proceed to have said right of way condemned as by law provided. A copy of said notice is hereto attached, marked Exhibit A and made a part of this petition."

[fol. 416] Par. 2 of answer in said case No. 27274:

"2. In answer to paragraphs 2 and 3 of said petition defendant admits that notice was served by it as stated and substantially as set forth in Exhibit "A" and "B" of said petition, except that said exhibits do not show the dates of said notice and acknowledgement. Defendant shows however, that at the time said notice was served upon the State of Ga., by service on the Governor, the general assembly of Ga. was in session."

Par. 7 of petition in said case No. 27274:

"(7). That it appears from said notices served upon the governor that it is the intention and purpose of said W. U. Tel. Co., to condemn a portion of the right of way of the State's railroad, lying within the State of Ga. for its telegraph lines, not only during the term for which said railroad is now under lease but in perpetuity and for this purpose it is attempting to make the State a party to the condemnation proceedings heretofore begun against the lessee of said railroad wherein it is sought to condemn the usufructuary interest in the right of way as held by said lessee."

A portion of Par. 6 of answer in said case No. 27274:

"6. In answer to paragraph 7 of said petition, defendant admits that it is its purpose to condemn a portion of said right of way in perpetuity, subject, however, to the laws of Ga."

"Exhibit A" to petition in said case No. 27274 and which is referred to in Par. 2 thereof:

#### EXHIBIT "A" TO PETITION IN CASE 27274

"To the State of Georgia:

"The Western Union Tel. Co. desires to acquire a right of way upon which to maintain and operate, and when necessary construct, maintain and operate its telegraph line on the lands composing the [fol. 417] right of way of your railroad, known as the W. & A. R. R. as hereinafter more fully set forth.

"The location of the right of way sought to be acquired is substantially that location now occupied by the telegraph line of the W. U. Tel. Co. along main line of your railroad from Atlanta, Ga. to the Tennessee line at or near Graysville, Ga.

"Said location is more specifically defined as follows:

#### "Main Line

"The line runs from Atlanta, Ga. to the Tennessee State line at or near Graysville, Ga., through the counties of Fulton, Cobb, Bartow, Gordon, Whitfield and Catoosa, a distance of approximately 121.37.



"Said telegraph line will enter upon the right of way of said railroad at the Marietta Street bridge at the same point where it now enters upon said right of way on the east side of said main line tracks, and will continue on the east side of said track for a distance of forty five poles to the north end of Howell's yard, a point 1,110 feet north of the 3d mile post. At this point said line will cross said tracks and continue on the west side of the tracks 110 poles to the north end of Hill's Park at a point 1,905 feet north of the 5th mile post. At this point said line will cross said tracks and continue on the east side of said tracks 32 poles to the 6th mile post, at which point said line will divide, and part of said line cross to the west side of said railroad tracks. From the 6th mile post to the Tennessee state line said line will extend on both sides of said tracks as now located, except at the following points:

"At Marietta the wires on the east side of the track will cross to the west side at a point 690 feet south of the present passenger [fol. 418] depot at Marietta, and run along with wires on the west side for a distance of 94 poles, as now located said east wires crossing back to the east side at a point 2,150 feet north of the 22nd mile post.

"At Adairsville, the wires on the east side of the track will cross over to the west side of the track at a point 1,638 feet south of the passenger depot, and extend along with wires on the west side for a distance of 20 poles, as now located, to a point 1,285 feet north of the passenger depot at Adairsville, at which point said wires will cross back to the east of the track.

"At Dalton, Ga., the wires on the east side of the track will cross over to the west side of the track at a point 742 feet south of 99th mile post, and extend along the west side to a point 225 feet south of the passenger depot, where they will cross to the east side, and extend along the east side to a point 600 feet north of passenger depot, where they will cross to the west side and extend along the west side to a point 1,000 feet from passenger depot, where they will return to the east side.

"Over the tunnel near Tunnell Hill, said wires will consolidate, extending over the tunnel, as now located.

"The right of way thus sought to be acquired by the Western Union Telegraph Company shall be of sufficient width to enable it to conveniently construct (when necessary) maintain and operate its line located and constructed substantially as follows:

"As many wires or cables of wire as may be necessary from time to time to transact the business of said company. These wires or cables are to be strung on poles placed at an average distance from the center of said present main line track of twenty-seven (27) feet, except where said right of way is limited or widened, with a minimum distance from edge of right of way (except where right of way is [fol. 419] limited or widened) of six feet. The poles shall have a length of not less than twenty (20) feet, and shall be placed in the grounds a depth of not less than four (4) feet, and have a circumference of about thirty (30) inches at the base and twenty (20) inches at the top. At highways, railway crossings, depots and side



tracks, said poles shall have a height of from twenty-five (25) to forty (40) feet *about* the ground. There will be an average of forty (40) poles per mile on said telegraph line on both sides of said tracks from Atlanta, Ga., to Kingston, Ga., and of thirty (30) poles per mile from Kingston, Ga. to the Tennessee line.

"In order to reach the offices of the Western Union Telegraph Company as now located or to be established by it, there will be wires crossing the tracks of said railroad from the main telegraph line, with one or more poles on the right of way of said railroad, at the following points: Bolton, Marietta, Emerson, Kingston, Vinings, Kennesaw, Cartersville, Adairsville, Smyrna, Acworth, Rodgers, Calhoun, Resaca, Dalton, Tunnel Hill, Ringgold and Graysville.

"At all points where said telegraph wires will cross said tracks for reaching offices, the lowest wire will not be less than twenty-five (25) feet above the tracks.

"The Western Union Company desires the above described right of way for the purposes herein specified for a perpetual term, subject to the relocation of said telegraph line on said right of way, to conform to any uses and needs of said railroad company for railroad purposes.

"In the event that you intend at this time to construct a telegraph line for railroad purposes on your said right of way, and that you select the location herein designated and selected for the telegraph line of the Western Union Telegraph Company, the Western Union [fol. 420] Telegraph Company agrees to shift the desired right of way and to erect its fixtures, posts and wires, and to construct, maintain and operate its telegraph line on the line herein referred to, upon such portion of said right of way and at such distance from the track of said railroad and its telegraph line for railroad uses, as will not obstruct or interfere with the ordinary use of such railroad telegraph line or right of way for railroad uses.

"For this right of way, the Western Union Telegraph Company offers you the sum of five (\$5) dollars per mile per post of right of way so occupied.

"Please advise on or before August 8th, 1912, if this sum is acceptable, so that the matter may be closed. Failure to make response within the time will be treated by the Western Union Telegraph Company as a refusal of its offer, and it will proceed to have said right of way condemned as by law provided.

"Dorsey, Brewster, Howell & Heyman, Duly Authorized Attorneys for the Western Union Telegraph Company.

[fol. 421] J. HOUSTON JOHNSON, sworn as a witness for plaintiff, testified:

Direct examination:

I am a civil engineer and have been one for about thirty five years. I have been special engineer and a consulting engineer to the State of Ga., and the W. & A. lease commission and the Railroad Commis-

sion of Ga. Before I became connected with that work I was in the service of the L. & N. R. R. eighteen years as engineer and roadmaster in the construction, location and operation and maintenance of the railroad. Recently, in connection with Mr. Anderson, Asst. Division Engineer of the W. & A. R. R. I made a survey of the lines of the W. U. Tel. Co. from here to Chattanooga on foot and on motor car from here to Chattanooga, in this month.

The W. U. Tel. lines, to the best of my recollection begins out here at the stock yards, the first pole is within about twenty feet of the center line of the old main track of the W. & A. R. R. and from that point it crosses the W. & A. tracks and goes on the east side of the main line and continues on the east side to a point near what is known as the Tower No. 1 before it crosses back and goes on the west side. From there to the north end of Hills Park yard it stays on the west side and then crosses to the east side and thence along the east side to mile post 6 from Atlanta, and crosses back then to the west side and continues along the western side of the W. & A. R. R. I am speaking of the W. & A. R. R. track, continuously to mile post 131, which is about seven miles from Chattanooga, except a short space at Dalton where it crosses and recrosses over the station grounds. It goes on the left hand side almost continuously. At that point near the seven mile post it crosses again to the east side, and then goes [fol. 422] clear away from the W. & A. R. R. right of way and does not approach it again until it gets to East End Avenue where one pole sets about ten feet from the center of the track and then leaves it. From mile post C-7 there is only one pole near the right track. "C-7" is mile post C-7, 131 miles from Atlanta and seven miles from Chattanooga. I was in charge of telegraph lines, maintenance of telegraph lines, as roadmaster from time to time, I had supervision of telegraph lines with regard to the operation of the railroad in connection with them.

The general position of the poles and wires of the telegraph lines along the line I had charge of as roadmaster was substantially that as along the W. & A. R. R. except generally speaking a little further away, or a little wider width of right of way. Whenever we had trouble of any kind ourselves near or along the road, whether from derailments or wind storms, or anything of that kind, the poles of the W. U. Tel. Co. line was more or less a source of trouble and annoyance in restoring the road for business again, if the wreck happened to be on the side where the telegraph wires were, the poles and wires were in the way of clearing the wreck. With reference to our drainage ditches, if the poles were in the way, we had to have them set back out of the way; that frequently happened. The average height of the W. U. pole above the ground is about twenty to twenty-five feet. If it was necessary to cross another railroad or another line, the poles are taller, or, if the wires cross the track they are taller in order to give sufficient clearance for a train passing under the wire. I have found, in my experience, where poles were located say within 20 feet of the track there was trouble from their falling down, or being blown down on the track of the railroad.

**Cross-examination:**

I was speaking of roads other than the W. & A. R. R. I have no [fol. 423] direct knowledge of anything connected with the W. & A. R. R.

J. P. ANDERSON, sworn as a witness for plaintiff, testified:

**Direct examination:**

I occupy the official position in connection with the W. & A. R. R. of Asst. Division Engineer. I am now Assistant Division Engineer of the W. & A. R. R. My jurisdiction extends from Atlanta to Chattanooga. I have recently, in connection with Mr. Johnston, made a survey of the line of poles and wires of the W. U. Tel. Co. on the right of way of the W. & A. R. R. I have made a memorandum or description of what I found. The line begins near Howells Station about two and a half miles out from the depot, and crossing over from the west to the east side and then goes along on the east side to a point between tower 1 and 2 and then it crosses back to the west side and continues along the right of way to a point near mile post 5 near Hills Park. Then it crosses back to the east side and continues on the east side along the right of way to mile post 6; then it runs along on the west side till it goes to a point near Dalton, mile post C-39, and continues then on the east side of a short distance through Dalton and crosses back to the west side and continues on the west side to a point near mile post 121, or 7 miles from Chattanooga, at mile post C-7; then it crosses back to the east side and continues along the right of way to a point where it crosses the track near East End Avenue; it is not on the right of way except there is one pole on the right of way after that, that pole being ten and two tenths (10.2) feet from the center of the track. That line starts at about near mile post Atlanta 3 or Chattanooga 135. I have had experience of having a line of poles and wires of another company on the right of way of a railroad company. The operation of locomotive cranes [fol. 424] in doing work along the line of railroad, a telegraph line is very much in the way, and then in time of wind and storm, the poles are liable to fall across the track and obstruct the movement of trains and cause wrecks. I have found trouble with my drainage ditches. The guy wires and poles also are in the drainage ditches at times, and they obstruct the flow of water and fills up the ditches and causes the track to become soft.

**Cross-examination:**

The N. C. & St. L. operating the W. & A. R. R. has itself a line of poles, telegraph and telephone line on the other side from that on which the W. U. has its line. And the N. C. & St. L. pole line is on the right hand side of the line from Atlanta to Chattanooga. Where this other one crosses, they are sometimes on the same side. Generally they are not both on the same side at the same time. Each

of these pole lines are located substantially the same distance from the track.

Q. There is the same liability to fall on one side of the line the poles as liable to fall on one side as the other set of poles on the other, are they not?

A. It is just doubled up, two lines; and you have just twice as much liability as you would have with just one line. There is just as much liability, and the same liability and likelihood of poles of one line falling as of the other falling. I do not know whether there is the same likelihood of poles of one line falling on the track as the poles in the other line falling on the track. The railroad company would look after their own line. I don't know whether or not the W. U. would keep their poles from falling, take the same care to keep them from falling as the railroad company would, I can't state that. [fol. 425] Q. So you could not state exactly in what condition the W. U. poles are kept in, can you?

A. I don't know how often they are inspected, no sir. I know exactly what condition the N. C. & St. L. poles are kept in.

Q. Did you notice any material difference between the condition of the pole lines?

A. The pole lines of the east side has recently been reconstructed and is in better condition, in my opinion, than the one on the west side. That is just because of recent construction.

And it is true that all telegraph lines run for a certain length of time and then there is reconstruction of those lines. The reconstruction of one line would not be contemporaneous with the reconstruction of another line, and probably when the W. U. Line along the W. & A. would be reconstructed, ours having just been reconstructed, theirs would be reconstructed later. When the poles in the line now owned by the N. C. & St. L. along the W. & A. which have just been replaced, and the line reconstructed when that line is again reconstructed they will be placed in about the same location. And when it was recently reconstructed the line was placed in just about the same location. They didn't move their pole line further from the track when they reconstructed it not to amount to anything. And they are substantially in the same position as when the W. U. had them, and the guys and supports were taken out of the ditches in the reconstruction. I do not know how many were in the ditches. I could not tell how many. I do not know how many W. U. guys or braces were in any ditches or are in any ditches along the W. & A. R. R. but there are quite a number. I don't know how many there are, but there are quite a number. *I don't know how many there are, but there are quite a number.*

Q. Did you examine those more carefully than you did those along [fol. 426] the line of the N. C. & St. L.?

A. I just notices they were in the ditch line. I didn't make any special examination or give them any special attention—not for being in the ditches. I did not take practically the same note of one line as I was going along as of the other. I have been connected with the W. & A. R. R. between here and Chattanooga three years.

I have been connected with the N. C. & St. L. Road six and a half years. The N. C. & St. L. R. R. in Tennessee has also constructed and has along its lines telegraph and telephone poles along its right of way. And the telephone and telegraph lines are substantially the same. Those lines in Tennessee are constructed substantially and located practically as these lines, and substantially the same distance from the track, and substantially the same as its own line which it now has along the W. & A. R. R. I know of a case where there has been interference with the locomotive crane by nearness or storms or something of that kind out here at Halls, a locomotive crane doing ditching. That was not the same one I heard Mr. McDonald testify about. This one happened in the last two weeks out there at Halls. The interference was that the poles and wires were so close the track the swing of the locomotive crane could not get to the ditch to pick up the dirt, and could not carry the dirt far enough from the track to keep it from falling back in the ditch, on account of the wires. Of course we could not move them, and we could not put the dirt where we otherwise would have put it. It was excavating for a ditch line for drainage. The crane is one of these big things that sticks out like a derrick to lift dirt. It was in connection with it.

---

M. S. EANSON, sworn as a witness for plaintiff, testified:

Direct examination:

The position I occupy with the W. & A. R. R. is master mechanic. [fol. 427] I have been with the road nearly 32 years and my present position as master mechanic since 1914. The extent to which my duties take me out on the line of the road in case of disasters or accidents—things of that sort—is—clearing accidents in a mechanical manner. I always usually went out with the wrecking machines. Telegraph poles and telegraph wires interfere considerably with the operation of wrecking machines and cranes and such as that. They interfere with the range of the cranes. Naturally, in wreckage if on the main line, the jib or boom, as we commonly call it, the poles and wires are within this range, they are not far enough from the main line and it interferes with clearing up wrecks, the wires and poles are in the way, and it makes it necessary often to use the jib in such a short radius you cannot place the stuff far enough from the track, and that requires frequent movements to place it far enough to one side to get it out of the way, and that makes it difficult and that is true in many instances. I have known of the wires falling upon the main track and interfering with the movement of trains. I had one case which came under my personal observation near Altoona, where the poles broke and the braces gave way in case of sleet, and they fell on the track right in front and got tangled up with the engine. He had to stop and cut the wires loose — get the wires off. We tore most of them down, however. The practical difference in handling your wreckers where you have only one main

telegraph line on one side of your track, and when you have two is when you have but one you can use the other side of the track. You can use the opposite side of the track, if you have only one line on the side of the track. Where the line of poles and wires on one side, you can use the other side of the track that is free. You can then use the side of the track that is free. And where you have a [fol. 428] line on each side it interferes with your work in such cases very greatly.

Cross-examination:

Q. If you wanted to use a crane or wrecker on the side of the track on which there was a telegraph line, or dig a ditch on that side, you say those wires might be in the way?

A. If you had wires on both sides of your track.

Q. I am asking you about one side, suppose only on one side?

A. If I only had them on one side I would not use that side where the wires were on.

Q. But suppose you wanted to dig a ditch on the side of the track on which there was not any telegraph line?

A. I don't know I am not in that business.

The crane is used to clear wrecks and lift cars and engines. If there was a wreck and the train fell over on the same side as the telegraph line was on, it would help me that there was not any telegraph line on the other side—it would help me wonderfully. To take a car over here, pick it up, we would have a long radius in which to bring the car over here out of the way completely. I would drop my boom or jib to a long radius and work my track clear all around and drag everything out of the way. The crane is a big long arm, so to speak, to reach out and carry stuff from the track or to the track, where we want it. It swings way over to one side—swings in a circle. If you want to reach over to one side of the track and get a car that has fallen there, you can do so, but if there are wires there those wires interfere with getting the crane to that car and lifting that car. It does not interfere with it as much as if there was not a wire on the other side, or anywhere, so far as getting the car off and lifting it, for this reason, when you are working your machine, your wrecker, [fol. 429] this is problematical, you work your machine from one side, if there is a telegraph line you are working under an obstruction and you run this jib out to make any radius and reach this car, and revolve to place it any distance out and you have them on both sides they interfere, but where you have one only you can still work off on the other side without interference, but where you have the two you have to shorten your radius and often it interferes with the time in doing the work, sometimes increasing it one half to two thirds.

Q. Suppose there were simply telegraph wires on one side of the track and none on the other, and suppose that the cars fell off of the track and went down an embankment on the same side as the telegraph line existed on. Now, could your arm reach out and get that car and move it one the other side of the track. I am not talking

about the wire you had on that side where the car was, but could you reach down with your arm and pick up the car, you have got to do it some way, whether there is one the other side of the track a telegraph line or not.

A. You would have to get hold of your car, but if no telegraph line was on the other side, you would have no interference there. I could reach down and get my car. I understand you. This car has gone down, fell on the side where there is a telegraph line, he won't handle that with a long arm radius, but he will reach down there and grab that car and pull it where the wires don't interfere. You drag it out of the way of your wires and if none on the other side, you can handle your stuff over there without interference. In order to get that car you don't reach your arm down under that telegraph wire, you simply run your line down and pull your car up to the track?

Q. Those lines reach down and will hitch on to the car and pull it out of the way?

A. If I understand you, not in the instance you are relating. The instance I spoke of where the line was down was near Altoona, [fol. 430] that is where there was a windstorm, sleet. The wires interfere with getting up a wreck practically every time we have an accident, not every time, but practically every time. Fortunately we have not had one of those accidents in six months. Sorry to say, we had them quite frequently before. These accidents come intermittently. They are not always the same, and do not come with regularity. Cars are not wrecked even when derailed. There would be such a thing as interference on account of the wires in practically every instance where you have an accident, but I cannot say how often those things occur, and it is not every accident in which you have that interference. If a locomotive was derailed on the track, didn't get off, and no cars were away from the track, that don't affect it. Where cars are off the track and interfere with the passage of trains and we have not time to get them back on, and want to set them out of the way, to clear the track for passage of trains you have got to do it quickly, you want to get them out of the way. If there is no telegraph line you can just set them out of the way. In any event you can work so much more rapidly. Our own telegraph lines, if they are in the same location as the W. U. would interfere with us to the same extent if we had them on both sides. I am not very familiar with our own lines of telegraph. I suppose from my observation they are about like the W. U. The Altoona incident has been several years ago.

---

#### EXHIBIT IN EVIDENCE

The plaintiff introduced in evidence the following contract of June 18, 1884, between the L. & N. R. R. Co. and the W. U. Tel. Co.:

This Agreement made and entered into this eighteenth (18th) day of June, 1884, by and between the Louisville & Nashville Rail-



road Company hereinafter designated as the railroad company, and [fol. 431] the Western Union Telegraph Company, hereinafter designated as the telegraph company.

Witnesseth: Whereas the operation of the telegraph company's lines along the various railroads owned, controlled or operated by the railroad company, has been conducted under the provisions of an agreement between the parties hereto dated May 14th, 1880, which agreement provides that it may be terminated on one years written notice after July 1st, 1885.

And whereas, it is desirable that a new agreement should be entered into between the parties hereto:

Now therefore for and in consideration of the covenants and agreements herein contained, the parties hereto have mutually agreed as follows:

First. This contract is intended to cover and shall embrace all the railroad lines now owned, leased, controlled or operated by the railroad company, which are as follows:

Those absolutely owned by the railroad company being: Cincinnati Division, extending from Newport, Ky. to Louisville, Ky. Lexington Branch, extending from La Grange, Ky. to Lexington, Ky. Louisville Division, extending from Louisville, Ky. to Nashville, Tenn. with branch from Bardstown Junction, Ky. to Bardstown, Ky. Knoxville Division extending from Lebanon Junction, Ky. to the Tennessee State Line at Jellico, Ky. Memphis Line extending from Memphis Junction near Bowling Green, Ky. to Memphis, Tenn. Henderson Division, extending from Edgfield Junction, Tenn. to Henderson, Ky. with branch from Madisonville, Ky. to Providence, Ky. Pensacola Division, extending from Pensacola Junction, Ala. to Pensacola, Fla. Pensacola & Selma (upper and lower) Divisions, extending respectively from Gulf Junction, near Selma, Ala. to Pine Apple, Ala. and from Pensacola Junction, Ala. [fol. 432] to Repton, Ala. and New Orleans & Mobile Division extending from Mobile, Ala. to New Orleans, La.

The lines leased by the railroad company being: Shelby Railroad, extending from Anchorage, Ky. to Shelbyville, Ky. Northern division of Cumberland & Ohio Railroad, extending from Shelbyville, Ky. to Bloomfield, Ky. Southern Division of Cumberland & Ohio Railroad, extending from the junction near Lebanon, Ky. to Greensburg, Ky. Southeast & St. Louis Railway, extending from Evansville, Ind. to East St. Louis, Ill., with branches from McLeansboro, Ill. to Shawneetown, Ill. and from O'Tallon Junction Ills. to O'Tallon, Ills. Nashville & Decatur Railroad, extending from Nashville, Tenn. to Decatur, Ala. Mobile & Montgomery, Railway, extending from Mobile, Ala. to Montgomery, Ala., and Selma Division of Western Railroad of Alabama, extending from Montgomery, Ala. to Selma, Ala.

The lines controlled by the railroad company being: Nashville, Chattanooga & St. Louis Railroad extending from Chattanooga, Tenn. to Hickman, Ky. and the various branches thereof. South & North Alabama Railroad extending from Decatur, Ala. to Mont-

goniery, Ala. with a branch from Elmore, Ala. to Wetumpka, Ala. Pontchartrain Railroad extending from New Orleans, La. to Lake Pontchartrain, La. Pensacola & Atlantic Railroad, extending from Pensacola, Fla. to River Junction, Fla. Owensboro & Nashville Railroad extending from Owensboro, Ky. to Adairsville, Ky. Nashville & Florence Railroad, extending from Columbia, Tenn. to Lawrenceburg, Tenn. Glasgow Railroad, extending from Glasgow Junction, Ky. to Glasgow, Ky. Birmingham Mineral Railroad extending from Louisville, Harrods Creek & Westport Railroad, extending from Louisville, Ky. to Prospect, Ky. And this contract is also intended to cover and it shall include, any branch or branches that may be constructed by the railroad company or other rail- [fol. 433] road or railroads that may be acquired by it, either by lease or purchase or that may be controlled or operated by it during the existence of this agreement, should it be lawfully competent to include it or them.

Second. The railroad company, so far as it legally may hereby grants and agrees to assure the telegraph company, the exclusive right of way on and along the line, lands and bridges of all roads now owned, leased, controlled or operated by said railroad company, or which it may hereafter own, lease, control or operate for the construction and use of such lines of poles and wires or underground wires for commercial or public uses or business as the telegraph company may require, together with the exclusive right to maintain offices in its depots for commercial telegraph business, and the railroad company will not transport men or material for the construction or operation of any line of poles and wire or wires or other lines in competition with the lines of said telegraph company party hereto, except at and for the railroad company's regular local tariff rates, nor will it furnish for such competing line, or lines any facilities or assistance which it may lawfully withhold nor stop its trains, nor distribute material therefor at other than regular stations.

Provided always that in protecting and defending the exclusive grants conveyed by this contract, the telegraph company may use and proceed in the corporate name of the railroad company, but shall indemnify and save harmless the railroad company from any and all damages, costs, charges and legal expenses incurred therein or thereby.

Third. The railroad company agrees to transport free of charge over any and all of its roads, all officers and employees of the telegraph company, when traveling on the business of the said [fol. 434] company and also to transport free of charge and distribute along its said roads at the points required, all poles, wire insulators, brackets and all other material of the telegraph company, when traveling on the business of the said company and also to transport free of charge and distribute along its said roads at the points required, all poles, wire insulators, brackets and all other material of the telegraph company to be used in the construction, reconstruction, main-

tenance repair and operation of its telegraph lines and wires on the said roads covered by this agreement, and all supplies and other material for the establishment and maintenance of the offices thereon; and the railroad company also agrees to transport free of charge all poles and other material for the use of said telegraph company on its lines beyond or off the roads covered by this agreement to an amount computed at the local freight charges of said railroad company, not exceeding one half ( $\frac{1}{2}$ ) of the amount of free telegraph service which the telegraph company may perform for the railroad company beyond the roads covered by this agreement, the tolls for said free telegraph service to be computed at the regular day rates of the telegraph company between the points at which the messages of the railroad company may originate, and the points to which they may be destined. Settlements to be made at the end of each year.

All of such transportation shall be furnished by the railroad company with reasonable promptness, upon application of the superintendent or other officer of the telegraph company.

Fourth. The railroad company shall furnish on the request of the superintendent or foreman of the telegraph company all the unskilled labor necessary for the maintenance and ordinary current [fol. 435] repairs of the telegraph company's lines of telegraph on said roads such repairs to include the necessary renewal of poles, not to exceed an average of one new pole for every mile of road operated by the railroad company in any one year until the lines shall require reconstruction; but for general reconstruction and renewal of poles the telegraph company shall supply the labor, the railroad company furnishing transportation and distribution of material as aforesaid.

Fifth. The telegraph company agrees to furnish all material and the necessary line repairers for the maintenance, repair and reconstruction of its lines and wires along said railroads, and a competent foreman to direct the labor which the railroad company hereinbefore agrees to furnish. The telegraph company further agrees to furnish within six months after the receipt of written notice from the railroad company, all labor and material, and to construct a line of telegraph on any road or branch now or hereafter owned, leased, controlled or operated by the railroad company on which there may be no line of telegraph. The telegraph company further agrees to furnish instruments and local batteries and material to maintain said batteries, and blank forms and stationery for commercial business, for the establishment, maintenance and operation of the telegraph offices on and along said railroads. The telegraph company will also furnish the use of its main batteries for the successful operation of its wires along said railroads, including the wires set apart for the use of the railroad company.

Sixth. At all telegraph stations of the railroad company, except at its depots or stations located at terminal points where the telegraph company maintains separate offices, the railroad company's employees, acting as agents of the telegraph company, shall receive,

transmit, and deliver promptly such commercial or public messages [fol. 436] as may be offered at the tariff rates of said telegraph company, and shall render to said company monthly statements of such business and full accounts for all receipts therefrom, and the railroad company shall pay to said telegraph company at such time and in such manner as it may direct, all of such receipts at said offices, after deducting ten (10) per centum of the cash receipts at said offices on business with points on the telegraph company's lines, it being agreed that the railroad company may retain said ten (10) per centum as compensation for the services of its employees in the transaction of and accounting for said commercial telegraph business; but the railroad company shall not retain any portion of tolls on cable messages or tolls belonging to lines of other companies. The railroad company's employees shall not, without the consent of said telegraph company transmit over said telegraph lines, any free messages except herein provided for, and concerning all telegraph business, whether paid or free, shall conform to all rules and regulations of said telegraph company applicable thereto. Provided said railroad employees shall be entitled to make special deliveries at the cost of the addressee at greater distances than one half of a mile from the offices.

Seventh. Either party to this agreement may establish and maintain offices at such places on the line of said roads as it shall deem expedient; and if said telegraph company elects to establish an office at a station of said railroad company, then the railroad company, if it has room to do so shall furnish suitable accommodations in such station free of rent; and if at such station one person can attend to the telegraph business of both parties, the telegraph company's operator shall do the telegraph business of the railroad company as its agent and without charge; and said operator at such [fol. 437] station shall be subject to the directions of the chief operator of the railroad company, so far as railroad business is concerned. Whenever the number of paid and collect messages including repeated messages, sent from any railroad office, exceeds four (4,000) thousand in any one year the telegraph company shall provide an operator for such office, and said operator shall, as hereinbefore provided, do the telegraph business of the railroad company as its agent and without charge. Whenever the telegraph business of both parties hereto at any office of the telegraph company in a railroad depot becomes so large that more than one operator is needed to do such business of both parties, then the railroad company will employ and pay its own operator.

Eighth. It is a condition of this contract that the railroad company is not to be responsible for and the telegraph company hereby covenants and agrees to save the railroad company harmless and indemnify it against any loss or damages of any kind arising from any injury to persons in the employ of or property belonging to the telegraph company, while being carried free over said roads under this agreement, or from any neglect or failure in the transmission or delivery of messages for any person doing business with the tele-

graph company or on account of any other public telegraph business, and the telegraph company shall not be responsible for and the railroad company agrees to indemnify and save harmless the telegraph company against any loss or damages of any kind arising from or on account of any error or failure in the transmission or delivery of messages sent for the railroad company under this agreement. And the railroad company is not to be responsible for, and the telegraph company covenants and agrees to save it harmless and indemnify it against any loss or damages of any kind including costs [fol. 438] and attorney's fees incident to or resulting from any injury to persons growing out of the position or condition of any of the telegraph poles, wires, or other property of the telegraph company along said railroad lines.

Ninth. One wire shall be set apart for the preferential use or the railroad company along the entire length of all the roads, except along branch roads where only one wire is maintained and on such wires along said branch roads the important business only of the railroad company relating to the movement of its trains, accidents and damage to road shall have precedence; otherwise the business of both parties hereto shall have equal facilities thereon. And it is further agreed that if the railroad company should at any time require greater wire facilities on any portion of its road than are herein provided, the telegraph company will furnish an additional wire at the cost price thereof upon its poles or the railroad company may at its own cost string said additional wire upon the telegraph company's poles in such manner and position as it may direct. Upon the wires thus set apart for the preferential use of the railroad company, its business messages and the family and social messages of its officers and agents may be sent free between all points on its roads; but all other business except that which is ordered to be sent free by the telegraph company shall be charged for and the proceeds thereof shall be remitted as hereinbefore provided.

Tenth. The telegraph company agrees to issue to such officers and agents of the railroad company, as may be designated by the president, vice president or general manager thereof, annual franks, authorizing the free transmission of messages relating strictly to the railroad or corporate business of the railroad company, originating at or destined to all points on the telegraph company's lines in the United States including points on the railroad company's railroads. [fol. 439] Said franks may be used for the transmission of such messages of the railroad company between the principal cities on the lines and at the termini of its roads; but it is understood and agreed that the railroad company shall, as far as practicable, transmit its business between all places reached by its roads over the wires herein set apart for railroad business.

Eleventh. It is mutually understood and agreed that the telegraph lines and wires covered by this contract shall form part of the general system of the telegraph company, and as such in the department of commercial or public telegraph business shall be controlled

and regulated by it, the telegraph company fixing and determining all tariffs for the transmission of messages and all connections with other lines. The railroad company further agrees that its employees shall transmit all commercial telegraph business offered at its offices over the lines of the telegraph company party hereto and shall account to the telegraph company exclusively for all such business and the receipts thereon as provided herein.

No employee of the railroad company shall, while in its service be employed by any other telegraph company, than the telegraph company party hereto.

Twelfth. The provisions of this agreement shall supersede said agreement hereinbefore mentioned and all other agreements between the parties hereto or their respective predecessors in ownership of control of their respective properties; and the provisions of this agreement shall be and continue in force for and during the term of twenty five (25) years from and after the first (1st) day of July eighteen hundred and eighty four (1884) and thereafter until the expiration of one year after written notice shall have been given by one of the parties hereto to the other of a desire or intention to [fol. 440] terminate the same, and in case of any disagreement concerning the true intent and meaning of any of said provisions the subject of such difference shall be referred to three arbitrators, one to be chosen by each party hereto, and the third by the two others chosen and the decision of such arbitrators, or of a majority thereof, shall be final and conclusive. Provided that should the lease or control of any railroad now held by the railroad company terminate before the expiration of the twenty five years hereinbefore specified, this contract shall not cover such railroad after the termination of such lease or control, unless the same should be renewed within the said term of twenty five years, or unless the owner or lessee of such railroad shall ratify this agreement, and should the railroad company cease from any cause to own any railroad or branch herein mentioned, this contract shall continue to apply to such railroad or branch if the telegraph company shall so elect, the railroad company agreeing that in case it shall part with the ownership or control of any railroad it will require the purchaser or lessee thereof to accept the obligations and benefits of this agreement, if the telegraph company shall elect to continue to apply this agreement to such road. Provided however and it is hereby expressly stipulated and agreed that if any of the provisions of this agreement shall be found unusually burdensome or oppressive to either party, such party after having given ninety (90) days' written notice to the other may propose such amendments or changes to this agreement as it may deem just and equitable and consistent with the general tenor of this agreement. In case the parties hereto shall not be able to agree upon such proposed amendments or changes, the same shall be referred to and settled by arbitrators in the manner hereinbefore provided, it being understood and agreed that the powers of such arbitrators shall not extend to making either wholly or substantially [fol. 441] a new contract, but simply to the relief of either party

2  
1  
7



from any provisions complained of, which experience under the agreement shall have proved to be inequitable, and the operation of which may not now be foreseen by the parties hereto. The decision of such arbitrators shall be binding upon the parties hereto and shall thereafter stand as a part of this agreement without further act of the parties, unless modified or amended by some future decision of arbitrators as herein provided.

In witness whereof the parties to these presents have caused their corporate names, by the hands of their proper officers to be hereunto subscribed, and their corporate seals affixed and attested, the day and year first above written.

The Louisville and Nashville Railroad Company, by M. H. Smith, President. R. K. Warren, Asst. Secretary. (Corporate Seal.) The Western Union Telegraph Company, by Jno. Van Horne, Vice President. A. R. Brewer, Secretary. (Corporate Seal.)

We, the undersigned, each for ourselves, hereby accept notice of the foregoing agreement executed on the eighteenth (18th) day of June, 1884, by and between the Louisville and Nashville Railroad Company, acting for itself and as the duly authorized representative of ourselves, and the Western Union Telegraph Company, and we hereby severally, each for ourselves assume the obligations and benefits of the said agreement and ratify and approve the action of said Louisville and Nashville Railroad Company in executing the same [fol. 442] for us and in our behalf, it being understood and agreed that our individual or several obligations in respect to said agreement shall not be released or impaired by any failure to observe the same on the part of any one or more of the owners of the railroads therein named. We further agree, each for ourselves, that in case the Louisville and Nashville Railroad Company shall from any cause cease to control or operate our respective railroads, then and in that case all of the terms and conditions of the foregoing contract dated June 18th, 1884, shall be and are hereby adopted and ratified, and are hereby constituted a contract between the Western Union Telegraph Company and each of us so far as said terms and conditions are applicable to our respective roads, each railroad company hereby contracting for itself with the Western Union Telegraph Company,

In witness whereof we have caused these presents to be executed in our respective corporate names by the hands of our proper officers and under our respective corporate seals.

The Nashville Chattanooga and St. Louis Railway Company, by J. W. Thomas, President. R. C. Bramford, Secretary. (Corporate Seal.) The South and North Alabama Railroad Company, by M. H. Smith, Vice President. H. M. Bush, Secretary. (Corporate Seal.)



The undersigned, the Pensacola and Atlantic Railroad Company hereby accepts notice of the foregoing agreement executed on the eighteenth (18th) day of June, 1884, by and between the Western Union Telegraph Company and the Louisville and Nashville Railroad Company acting for itself and as the duly authorized representative of the undersigned, and the undersigned hereby assumes the obligations and benefits of said agreement and hereby ratifies and approves the action of said Louisville and Nashville Railroad Company in executing the same for and in our behalf, it being understood and agreed that our individual obligations in respect to said agreement shall not be released or impaired by any failure to observe the same on the part of any one or more of the owners of the railroads therein named and that said agreement shall supersede the agreement dated December 30th, 1881, between the Pensacola and Atlantic Railroad Company and the Western Union Telegraph Company. The undersigned further agrees that in case the Louisville and Nashville Railroad Company shall from any cause cease to control or operate the Pensacola and Atlantic Railroad then and in that case, the agreement heretofore existing between the Western Union Telegraph Company and the Pensacola and Atlanta Railroad Company dated December 30th, 1881, shall be revived and shall continue in full force and effect in all respects during the remainder of the term thereof.

In witness whereof we have caused these presents to be executed and our corporate name by the hands of our proper officers and under our corporate seal.

The Pensacola and Atlantic Railroad Company, by M. H. Smith, President. R. M. Cary, Jr., Secretary. (Corporate Seal.)

At a meeting of the board of directors of the Louisville & Nashville Railroad Company held at the company's office No. 52 Wall Street, New York, on the 11th day of June, 1884, a quorum being present, the following resolutions were passed:

Resolved, that this company hereby approves the *the* contract heretofore [fol. 444] with submitted between the Louisville and Nashville Railroad Company, the Nashville, Chattanooga and St. Louis Railway, the South and North Alabama Railroad Company, and other railroad corporations owned or controlled by the Louisville and Nashville Railroad Company, and the Western Union Telegraph Company, bearing date the 18th day of June, 1884, to take effect July 1st, 1884, and to continue in force for twenty-five years, abrogating all existing contracts between this company and the other companies above mentioned and such telegraph company.

Resolved, that such contract be executed by the president and secretary on behalf of this corporation in due form, and that proper execution of the same on the part of the other companies therein mentioned be procured; that the contracts be exchanged, and that the same be entered at length upon the minutes of this company.

A true copy from the minutes.

Attest: R. K. Warren, Asst. Sec'y. (Corporate Seal.)

Plaintiff introduced in evidence the notice of condemnation given by the W. U. Tel. Co. to the W. & A. R. R. dated January 18th, 1912, a copy of which is hereinabove set forth as exhibit "A" attached to the petition in case No. 24730, Fulton superior court between the W. & A. R. R. Co., plaintiff, and W. U. Tel. Co., defendant, and referred to in paragraph 8 of that petition.

---

#### TESTIMONY FOR DEFENDANT

Defendant introduced in evidence a report of the chief engineer of the W. & A. R. R. in which is embodied a letter from W. L. Mitchell, chief engineer to Garst & Bean dated Oct. 11, 1850, the acceptance of the proposition therein contained, by Garst and Bean, under date of Oct. 11, 1850, and the report of W. L. Mitchell, chief [fol. 445] engineer of the W. & A. R. R. relative to the said contract and to what was done pursuant thereto, all of which is set forth as Exhibit 1, in an amendment to plaintiff's petition and referred to in Par. XVI of said amendment as supplanting an inaccurate copy of the same attached to the original petition.

W. L. Clay, one of the attorneys for defendant, stated in his place that the original of this correspondence and the original of this report could not be found; that he had hunted personally, and had found these documents in the library of the State; that they were the only documents relative thereto which he had been able to find. This report introduced in evidence was presented by the State Librarian from the State Library, under a subpoena or notice to produce, and this report was introduced in evidence in lieu of the original report and the letters therein contained in lieu of the original letters.

---

#### EXHIBIT IN EVIDENCE

Defendant introduced in evidence an act of the general assembly of the State of Ga., entitled "An act to incorporate the Augusta, Atlanta and Nashville Magnetic Tel. Co." approved January 27, 1852, the material portions of which act are the following:

"Sec. 1. Be it enacted by the senate and house of representatives of the State of Ga., in general assembly met, and it is hereby enacted by the authority of the same, that James M. Bean, John H. Glover and John P. King, and such persons as now are, or hereafter may be associated with them, including the subscribers in this State who have acquired from Samuel F. B. Morse, the right to construct and carry on the Electro Magnetic Telegraph, by him invented and patented, through this State and other States, on the route leading from the city of Augusta, through Atlanta, to the City of Nashville, in the State of Tennessee be and they are hereby made and declared a body [fol. 446] politic and corporate in law, for the purpose of constructing, erecting and maintaining a line of the said telegraph, on the

route aforesaid, or any other route through and within this State, and of transmitting intelligence by means thereof, by the name and style of the Augusta, Atlanta & Nashville Magnetic Tel. Co.

"3. Sec. III. That the said corporation shall have power and authority to build or purchase any connecting or side line in this State, having acquired the right to do so from the owners of Morse's patent, and may enlarge its capital for that purpose.

"6. Sec. VI. And be it further enacted, that the contract entered into on the eleventh day of October, 1850, by William L. Mitchell, chief engineer of the W. & A. R. R. and D. W. Garst and J. M. Bean on the part of said company, be and the same is hereby ratified and affirmed, and that at every election, each share shall entitle its holder to one vote, and absent stockholders may vote by agent or proxy, on producing written authority so to do. And in case of an equal number of votes on both sides, the election shall be decided by lot, and the chief engineer of said railroad, or other officer having the chief control of said road for the time being, shall by himself, or his proxy duly authorized, cast the vote to which the State is entitled under said contract.

"8. Sec. VIII. That the said corporation shall have power and authority to contract with any person or persons or bodies corporate, for the purpose of connecting its lines of telegraph with lines out of the State.

"9. Sec. IX. That the A. A. & N. M. Tel. Co. shall have power and authority to set up their fixtures along and across any high road or high roads; and any railroad which now or may hereafter belong to this State, and any waters or water courses of this State, without the [fol. 447] same being held or deemed a public nuisance, or subject to be abated by any private person: Provided, the said fixtures be so placed as not to interfere with the common use of such roads, waters, or water courses, or with the convenience of any land owned, further than is unavoidable.

"10. Sec. X. That the said corporation shall be bound, upon the application of any of the officers of this State, or of the United States, acting in the event of any war, insurrection, riot, or other civil commotion or resistance of public authority, or in the punishment or preventive of crime, or the arrest of persons charged or suspected thereof, to give to the communications of such officers immediate dispatch; and if any officer, clerk, or operator, of the said corporation, shall refuse, or wilfully omit to transmit such communications, or shall designedly alter or falsify the same for any purpose whatsoever, he shall be subject, upon conviction thereof before any court of competent jurisdiction, to be fined and imprisoned according to the discretion of the court, and in proportion to the aggravation of the offence for transmitting such communications. The said corporation shall charge no higher price than shall be usually charged by it for private communications of the same length. And the said corporation shall be bound in like manner, at all

times upon the application of any other person, not an officer of the State or the United States to give like immediate dispatch to each and every communication. And should any officer, clerk or operator, of the said corporation, wilfully omit to transmit such communications, or shall alter or falsify the same, he shall be deemed guilty, and punished in like manner as is provided in the foregoing part of this section relative to the communications of public officers.

"12. Sec., XII. That the service of process of any court of this [fol. 448] State, shall be legal and valid on said body politic and corporate, if the same shall be left at the office of the company within any district of this State: Provided, the president of the company is absent from, and beyond the limits of the said district, and that this act shall be deemed a public act."

---

D. H. COLLINS, being sworn as a witness for the defendant, testified:

I am the clerk of the superior court of Cobb county, Ga. It is a matter of history that the court house in and for said county, and the records thereof, were burned and destroyed during the civil war, between the years 1861 and 1865. Of my own knowledge I know that there are not in said office any of the original papers or records pertaining to litigation or titles to real estate prior to the civil war of 1861-1865, except such as have been re-recorded since said civil war. I have made a careful search among the records now existing of the superior court of Cobb county, and there are not among said records, or in his office any pleadings or other papers relating to the alleged case of Camp & Hammett v. A. A. & N. M. Tel. Co., or any execution issued in said case, said suit and execution alleged to have existed prior to the year 1861.

---

T. N. HARDIN, a witness for defendant, being sworn, testified:

I am secretary of the Augusta Chronicle Company, upon which company has been served a subpoena duces tecum, to produce certain issues of the Augusta Chronicle at Fulton superior court, on May 15, 1922, to be used by the defendant in the trial of said case. The issues called for in said subpoena duces tecum are those of Tuesday, May 10, 1859; Tuesday, May 17, 1859; Tuesday, May 24, 1859 and Tuesday May 31, 1859. [fol. 449] On or about the 26th day of November, 1921, there was a fire in Augusta, Ga., that involved the plant and records of the Augusta Chronicle Company, and all of the old files of said company, including the issues of the paper for the year 1859, were destroyed in said fire. For these reasons said Augusta Chronicle Company cannot produce in court the issues of the Augusta Chronicle called for in said subpoena duces tecum.

The testimony of ANDREW E. BURLIE, duly sworn as a witness for the defendant, taken by commissioner, was introduced in evidence:

Direct examination:

I was born in Kittanning, Armstrong county, Pennsylvania, on the 7th day of January, 1858, I am a lawyer by profession. I became connected with the law department of the Western Union Tel. Co. in the city of New York in May, 1909, and continued with the company in that capacity until November, 1916, when I was made secretary of the company and have since been such secretary and still am. Also during the same time I was secretary of the American Union Tel. Company and the American Tel. Co. As such secretary I have the custody and control of the minute books and certain other corporate records of the above named companies during the period above mentioned.

Cross-examination:

I have no personal knowledge of the actual execution of the documents attached to defendant's answer and the amendments thereto as Exhibits 2, 3, 4, 5, 6, 20 and 21. I was not present when they were executed. My connection with the defendant and the capacity in which connected with it and where located, has been answered by me in answer to the second direct interrogatory. I cannot say of my own knowledge when Mr. Atkins was born nor whether he [fol. 450] lived at Waverly, Tenn., prior to 1866 or 1867. Of my own knowledge I know nothing of the execution of the documents, copies of which are attached to defendant's answer as Exhibits 7, 8 and 9. I was not present when they were executed. My knowledge aside from reading the book itself of the history of the telegraph by Mr. Reid, is based on conversations with Mr. William H. Baker, who was many years in the service of the W. U. and of the Postal Tel. Companies. These conversations with Mr. Baker were between the years 1910, and his death in 1917, and with Mr. A. R. Brewer, who was secretary of the W. U. Tel. Co. for about thirty-four years following the year 1875. The conversation with Mr. Brewer were between the years 1909 and his death in or about the year 1920. I have not formed my opinions of any conversation with people outside of the telegraph business. I do not know who paid for the publication of the book nor how many copies of it were published. William Orton was president of the W. U. Tel. Co. from 1867 to the year 1878.

---

GEORGE W. E. ATKINS, sworn for defendant, testified:

Direct examination:

I was born in October, 1850 at Waterly, Tenn. I first became connected with a telegraph company in 1868, at Johnsonville, Tenn. I have remained with a telegraphic company from that date up to

the present time. At first not with a telegraphic company of itself, but with the Nashville and Northwestern Railroad Company, which was operated under a contract with that road and W. U. Tel. Co. in 1868 and 1869; then about two years with the Nashville and Northern Railroad Company, which was operating under a contract, as I have said, with the W. U. Tel. Co. the Nashville and Northwestern and the telegraph company were operating between Nashville, Tenn. and Hickman, Ky. That was in 1868 and 1869. [fol. 451] When I left the employ of that railroad company I went to work with the Louisville and Nashville Railroad Company in its headquarters office at Louisville, Ky. as a night operator in the train dispatcher's office. I was there in that position in 1869 and 1870, about two or three years. When I left Louisville I was still in the employ of the Louisville and Nashville. I went to Gallatin, Tenn., as operator for the Louisville and Nashville and train dispatcher. From Gallatin I went to Nashville in the employ of the W. U. exclusively in 1873, as operator in the Nashville office. From that period—from 1873 down to the present time—I have been with the Western Union Tel. Co. I have been ever since that time with the Western Union in its direct employ. Before that I was employed in the service of the Western Union in connection with the railroad and its business. When I left Gallatin I went into the exclusive service of the Western Union, in its main office, in Nashville, Tenn., as an operator. When I left Nashville I went to Louisville in the general office of the Western Union Tel. Co. as stenographer for the general superintendent, and private secretary to the superintendent of the W. U. Tel. Co. He covered practically all the territory south of the Ohio and east of the Mississippi, including the Atlantic Coast States and Texas. The name of that general superintendent was John Van Horn. He was in 1875 called to New York as vice president of the W. U. Tel. Co. He died in 1896, '97 or '98—somewhere along there. I left Louisville, Ky. when Mr. Van Horn came to New York in 1875. I still occupied the position as stenographer to him, and secretary and sort of chief clerk—with Mr. Van Horn as vice president of the Western Union. That was in 1875. From 1875 to the present time I have been and still am in the employ of the Western Union at headquarters in New York City. I next held with the Western Union in its New York office [fol. 452] vice position with Mr. Van Horn of assistant to the vice president in charge of all contract work from 1875—from about 1880 perhaps—I don't remember exactly, somewhere along there, approximately. It was from 1875 to 1880 that I was in the employ of the Western Union as assistant to the vice president Mr. Van Horn, in charge of the contract, and for sometime subsequent to 1880. When I say in charge of contracts I mean contracts by the Western Union and railroads. It included that, and the occupancy, and properties and lines and easements by the Western Union, contracts generally and other contracts, generally miscellaneous contracts. After 1875 or '80 I still continued with Mr. Van Horn as assistant to the vice president of the Western Union—with Mr. Van Horn for ten years when I was appointed superintendent of the contract

department. I don't remember just the exact date, and I was superintendent of the contract department, Mr. Van Horn's health having declined, and he being unable to give very much attention to the work. I subsequently became acting vice president of the company, in charge still of the contract department.

That was until about 1905 or '06, when I was made acting vice president of the company in charge of the contract department. The next year I was made full vice president in 1907 I guess it was. I am now first vice president of the Western Union Tel. Co. I became first vice president of the Western Union Tel. Co. some five or six years ago. Mr. Orton was vice president of the W. U. Tel. Co. when I went to New York in 1875, and had been for some years prior thereto. I should think Mr. Orton died about 1878 or '79 along there. I don't remember the exact date. I do not recollect any of the officers of the Western Union like secretaries, vice presidents or presidents of the Western Union who in 1880 or prior filled those positions who are now living. Mr. Green was at one time president [fol. 453] of the Western Union and he is dead. He became president in 1880. He succeeded Mr. Orton. Mr. Orton is dead. W. A. Baker was secretary. Mr. Burleigh succeeded him. Baker was secretary perhaps until 1910 or 1911, somewhere along there.

A book marked "C" being handed the witness, he testified:

I have seen this book marked "C" many times. It comes from the archives of the Western Union Tel. Co. it came from my office in New York. I remember seeing that book ever since I went into office. That book is a record book of contracts, principally as I remember of the Southwestern Tel. Co. and railroads and others the book in which the contracts are recorded before they are filed away, just as records are made of deeds, in county clerk's offices for instance, so as to have them handy instead of having to go to the originals. This includes the American contracts as well as the Southwestern.

A book marked "A-2 Contracts W. U. Tel. Co." being handed witness he testified:

That is a similar record book, containing records of contracts between telegraph companies and railroad companies and others. That book came from my office, it is part of the records of my office, the office of the contract bureau of the W. U. Tel. Co., I saw that book when I first went into the office forty-seven (47) years ago.

Q. I understand you to say that book contains copies of the contracts just as the first book?

A. That is just like the others, it is part of the series.

Q. Is the book I gave you first (marked "C"), first in point of time?

A. No, I don't think so. I think perhaps this antedates it, I don't remember.

Q. Will you please look in that book (marked "C") that is an old [fol. 454] book and the covers very much worn?



A. Yes, this book we call Book "C."

I find in this book "A-2 Contracts W. U. Tel. Co." the agreement dated the 12th day of August, 1858, between Hammett, Morris and others (copy of which is attached as Exhibit 2 to the defendant's answer. There is the record. It is found on page 105 of Book "A-2 Contracts W. U. Tel. Co." I find a copy of an agreement, dated September 1st, 1858, between Alvin D. Hammett, Morris and others. On page 107 of book "2 Contracts W. U. Tel. Co." copy of which is attached as Exhibit 3 to defendant's answer. I find a copy of a deed dated November 13th, 1858, from Wiley to William S. Morris and others, on page 109 of book "A2 Contracts W. U. Tel. Co." a copy of which is attached as Exhibit 4 to defendant- answer. I find copy of deed dated 28th of December 1859, William S. Morris, John S. Langhirne, Robert W. Crenshaw of the city of Lynchburg, Va. to American Tel. Co. on page 64, book "A-2 Contracts W. U. Tel. Co." copy of which is attached as Exhibit 5 to defendant's answer. I am still referring to that same book.

This indenture (the original being shown the witness) copy of which is attached as Exhibit 3 to defendant's answer with certificates of record in the office of the clerk of the superior courts of the counties of Catoosa, Case, Gordon, Fulton and Whitfield, Ga. in full on original though not fully set forth in said exhibit, dated the 1st day of September 1858, signed by A. D. Hammett, between A. D. Hammett of the county of Cherokee, Ga. of the one part and William S. Morris, John S. Langhorne, and Robert W. Crenshaw of Lynchburg, Va. recorded in the several counties of the State of Ga. I have seen that before. That comes from our contract records in my office. It has been there ever since I took charge of it. I found it there when the records were turned over to me, when I first took charge of the con-[fol. 455] tract department. It came to us, of course from the American Tel. Co. I did not know A. D. Hammett. I did not know William S. Morris, I did not know John S. Langhorne. I did not know Robert W. Crenshaw. I do not know whether any of those gentlemen are alive. I don't know anything about them. I find a copy of a letter in that book "C" page 73 signed by William S. Morris and Thomas H. Winn, to E. L. Sanford as president of the American Tel. Co., copy of which is attached as Exhibit 2 to amendment to defendant's answer. That is the first book I looked at, page 73 of Book "C."

This document (original handed the witness) dated June 20, 1865, signed by William S. Morris, president Confederate Tel. Co. and by Thomas H. Winn, treasurer and secretary C. T. Co. being release and quit claim and assignment to the American Tel. Co. (copy of which is attached as Exhibit 21 to amendment to defendant's answer) comes from the same source—from the records of my office and contract department of the Western Union Tel. Co. from the archives of our company. I first found that when I first took charge. It came to us as a part of the records of the American Tel. Co. This came to the W. U. as a part of the records of the American Tel. Co.

This document (the original) which you hand me is an agreement between the American Tel. Co. and the W. U. Tel. Co. dated

June 12th, 1866 (copy of which is attached as Exhibit 6 to defendant's answer. It comes from the contract department, contract office of the W. U. Tel. Co. at its headquarters in New York. I first saw that paper when I first took charge of the contract department. I do not happen to know about the signatures to those papers. They antedated me. I don't know about the signing of that deed. That was before my time there.

This paper dated June 19th, 1866 (original being shown the witness [fol. 456] ness) which is attached to that contract of the American Tel. Co. and the Western Union is directed to Hon. O. N. Palmer, secretary & treasurer of the W. U. Tel. Co., acknowledging receipt of contract between W. U. Tel. Co. of the 12th day of June, 1866, with certified copy of resolution of the American Tel. Co. signed by Cambridge Livingston, Secretary of the American Tel. Co. I saw that paper at the same time I saw the original contract. It was then attached to the original; and when I first saw that certified copy of resolutions I saw it among the contract papers, in the headquarters office of the Western Union. I am referring to this resolution of the 19th day of June, 1866.

I found in these contract books a copy of the original paper, release, quit claim and assignment which I just showed you, signed by William S. Morris, president, Confederated Tel. Co., Thomas H. Winn, treasurer and secretary C. T. C. being quit claim, release and assignment to the American Telegraph Co. of all properties of the Confederated Tel. Co. on page 81 of Book "C."

Witness being shown an agreement between the W. U. Tel. Co. and the W. & A. R. R. or railroad company, dated the 18th day of August, 1870, signed by Western Union Tel. Co. by William Orton, president and also the W. & A. R. R. by Foster Blodgett, Supt., W. & A. R. R. Approved Rufus B. Bullock, with the seal of the executive department, State of Ga. and H. C. Carson, secretary (copy of which is attached as Exhibit 7 to defendant's answer) said that document comes from the same record, the archives, the records of the contract department of the W. U. at its office in New York. The headquarters, the principal place of business of the W. U. Tel Co. is in New York. Its principal office is at the corner of Broadway and Day Street, 195 Broadway. It is known as 195 Broadway, New York [fol. 457] York county, State of New York. That has been its headquarters ever since I went to New York, and had been prior to that time. It was moved from 145 Broadway to 195 Broadway. New York City was its headquarters.

Witness being shown a contract between W. U. T. Co. and the State of Ga., copy of which is hereto attached as Exhibit 8. I know the signature of Mr. Orton, president of the W. U. Tel. Co. and Mr. Geo. Walker, secretary pro tem., on that paper. I don't know the other signatures, Blodgett and Bullock. Attached to that contract is a certified copy of a resolution adopted by the executive committee of the W. & A. R. R. at a meeting held Sept. 11th, 1876, signed W. C. Morrill, secretary. I first saw that paper at the same time as the other to which it is attached at the time I first saw the contract to which it is attached.

This telegraph signed by C. G. Merriwether to Geo. H. Mummford, V. P. and receipt of Adams Express Co. for valuable papers received from W. U. Tel. Co. addressed to Col. L. E. Bleckley, Atlanta, Ga. came from my same file where this contract was. They have been attached to that agreement ever since I have known them, since the date 1872, I presume. The receipt is dated 1872, and the telegram is dated Feby. 1872, they were attached; the telegram is addressed to Geo. H. Mummford and signed C. G. Merriwether.

This book marked Minutes of Stockholders American Tel. Co., (handed to witness) is the Minute Book of the American Tel. Co. proceedings of its stockholders, board of directors and committees, the records of meetings, board of directors and stockholders, and various committees. That book comes from the records, of the W. U. Tel. Co. in New York.

I heard Mr. Burleigh's testimony read. There are the minute books testified to by him, and brought here by me. I brought these contract books and these other records, the originals with me.

[fol. 458] Q. See if you can find any action in that book of any of the stockholders or directors or committee ratifying the contract between the W. U. and the American Tel. Co., the contract between those companies, which I just showed you, and which you have identified?

A. That is the contract of 1866?

Q. Yes.

A. Yes, here is the resolution.

Q. Now, is there any other minute that you find of stockholders' committee or anything else relative to this contract of the W. U. & American Tel. Co. of June 12th, 1866?

A. Yes, I find another record here. On page 76 is the resolution relative to this contract.

This book to which I have been referring marked "Minutes W. U. Tel. Co." comes from the records of the W. U. Tel. Co. at its headquarters office in New York City. It is a record of the minutes of proceedings of board of directors and stockholders of the W. U. Tel. Co. and of committees of the W. U. I heard Mr. Burleigh's testimony read. That is the minute book of the W. U. to which he refers in his testimony. I brought it here from New York. I find minutes in the W. U. Minute Book relative to this contract between the American Tel. Co. and the W. U. dated June 12, 1866, on page 83 of this W. U. book.

#### Cross-examination:

I did not bring with me the minutes of the W. U. Tel. Co. covering July 1912. I have not got the minutes of July 3d, 1912. I did not bring the minutes with reference to the condemnation proceedings against various lines of the L. & N. and others.

#### Redirect examination:

I have never found or seen the original of this letter from Morris [fol. 459] and Winn to Mr. Sanford, dated May 10th, 1865, recorded

in this record book C, page 73. That is the report of the Confederate officials. I have never been able to locate or find the original.

Recross-examination:

All I know about this so-called report is from this copy of it on the record book of the Western Union or the American Tel. Co. That is our record of the original document. I don't know who made this record. I don't recognize that handwriting.

Q. Mr. Atkins, what search have you yourself made among the archives and documents of the W. U. Tel. Co. for an original of that paper?

A. I have referred to the indexes and files of the company and that is the record which I found in this book. That is the record search that I have made.

Redirect examination:

I identified this morning copies of quite a number of instruments on pages 105, 107, 109, 64, 73 and 81 of the record books about which I testified, one of which was a copy of that original, referring to deed, copy of which is attached to defendant's answer as Exhibit 3.

Q. Now, did you look for the original of the conveyances of the papers that you identified as copies in the book, and what original if any, could you find, other than this original deed from A. D. Hammett to William S. Morris, John S. Langhorne and Robert W. Crenshaw, dated Sept. 1st, 1858, were you able to find any other?

A. That is the only original that I found in that search (referring to the original copy of which is attached as Exhibit 3 to defendant's answer).

Q. You produced that original of 1866 and the Bullock contract, [fol. 460] that is an original (copies of which are attached as Exhibits 6 & 7 of defendant's answer)?

A. Yes, but I understood you to refer to those of which I produced copies only.

I looked for all original muniments of title which I could find. I was requested to look for any and all muniments of title that the W. U. possessed, among those papers, under which the W. U. or its predecessors made claim to easements and title to the right of way involved in this case. I found in my search for any documents which were executed prior to 1866, prior to the one executed by the American Tel. Co. in 1866 this which I produced as original this indenture of the first of Sept. 1858, between A. D. Hammett of the county of Cherokee and said State of Ga. of the one part and William S. Morris, John S. Langhorne and Robert W. Crenshaw of Lynchburg, Va., of the other part (Copy of which is attached as Exhibit 3 to defendant's answer).

I did search for the originals and found no originals of the documents that I have produced here as copies. In other words, when I have been able to find an original I produced it. Where I could not find the original I produced the copy.

## Recross-examination :

Q. When did you yourself first become aware of the existence of these documents that you have produced as original?

A. Well, I don't know ; of course they have been in my records for many years and I have general knowledge of them. I had the whole of our records overhauled and reindexed and refilled and reorganized so as to make them easily accessible, some year- ago, perhaps 20 years ago, or more, so we could get at them readily and expeditiously. About 20 years ago I knew of the existence and character of these [fol. 461] documents, which I have produced as originals, and I can also say that 20 years ago I knew of the existence and character of these records that I have produced as copies. No question about it. I have grown up with these, you know.

---

C. W. TERRELL, SWORN as a witness, for defendant, testified :

## Direct examination :

I was born in 1834. I am familiar with what is known as the W. & A. R. R. between Atlanta and Chattanooga. I know where it is, between Atlanta and Chattanooga. The first time I ever saw a telegraph line along that railroad was in 1859, first at Acworth and from there on to Resaca. The old W. U. was on the left hand side looking towards Chattanooga, that is on the western side. I was born in Walton county, this State. I have lived in North Ga. most of my life. I left Ga. in 1866 for a time and went to constructing telegraph lines in Alabama and Tennessee. I went to Chattanooga in 1873. Since 1873 I have been familiar with the telegraph lines along the W. & A. R. R. I was line repairer in Chattanooga, my headquarters, for the W. U. My duties carried me on the W. & A. R. R. between Atlanta and Chattanooga and on the N. & C. road, and on the East Tennessee, Virginia and Georgia Railroad. From 1873 on, I was familiar with the telegraph lines between Atlanta & Chattanooga, along the W. & A. R. R. from 1873 when I went back to Chattanooga. The old W. U. lines in 1873 were on the right hand side of the W. & A. R. R. looking from Chattanooga to Atlanta, that is on the west side. That is the same side I saw those telegraph lines on along in 1859. I was connected with the W. U. or in the employ of the W. U. in connection with the telegraph lines along the W. & A. between Chattanooga and Atlanta, from 1873 on to Nov. 1898. The telegraph lines that I saw there along the W. & A. in 1873, continued the same up to 1898. The old line on [fol. 462] the western side crossed over at Dalton on account of some obstruction of the depot and the old car shed, and some buildings, I think, I will say for some eight or ten poles, I am not positive. Then it crossed back to the western side.

JAMES M. STEPHENS, sworn as a witness for defendant testified:

Direct examination:

I was born November 11, 1848, my first recollection of the W. & A. R. R. was in 1858, at Kingston. My parents moved there in 1859. I was born in Cherokee county, Ga. I have lived all my life in North Georgia, in Bartow, Cobb and Fulton counties along the line of the W. & A. My father was connected with the W. & A. He was its purchasing agent in 1859. My first knowledge about any telegraph line being constructed along the W. & A. R. R. was in 1857. There was a line on the W. & A. R. R. when we went to Kingston in 1859, but I don't know back of that. That line was constructed on the west side of the W. & A. R. R. on the left hand side looking towards Chattanooga going north. I was a messenger boy in the office in 1866. I first began to learn telegraphing in 1862. I started to learn in 1862 at Kingston. The first time I went to work for a telegraph company was at Kingston in 1862. I then worked for the Southern Telegraph Company, known as the Southern Telegraph Co. during the Civil War. I called it the Southern during the Civil War.

Q. Do you happen to know what was the name of the telegraph Company that constructed and operated the telegraph line on the western side of the W. & A. R. R. when you first knew of it in 1859?

A. I don't know the full name of it, but it had the word "Magnetic" in it, some name Magnetic Telegraph Company, I don't re- [fol. 463] member the name of the corporation. From 1862 after Sherman ran down through here I didn't have anything to do with telegraphing until 1866—from 1862 or '2 until after the war. I was out from about 1863 for a year or two. I was not really out at that time; I was there during those years and until Sherman ran us out. In the beginning of 1866 I think it was, I entered the service of the American Telegraph Company, I think it was that company for just a few months, at Kingston. I remained in that company's employ until it became a part of the W. U. I then entered the service of the W. U. It was in 1866 that — first went into the employ of the W. U. I remained in the employment of the W. U. from 1866 to 1913, something over 50 years. I held in the employ of the W. U. Tel. Co. the following positions. I was operator at different stations of the W. & A. Railroad and finally in Atlanta in 1869, I was sent to Atlanta. Prior to that time I had been operator at different places, Kingston and Cartersville. I was sent to Atlanta as operator. I have been there in Atlanta ever since and until today. I was chief night operator and day chief operator, in 1892, I was operator and manager in the office, from 1892 I was district manager, district superintendent in charge of the lines north of Charlotte, North Carolina, and on to Texas. That included the lines like those along the W. & A. R. R. In North Georgia I had under me while I was superintendent and district superintendent, lines up to and including Chattanooga and Northern Alabama, lines along the W. & A. and East Tennessee, Virginia and Georgia. Ever since I was an

operator along the W. & A. I had under my observation the telegraph lines along the W. & A. of the Eastern U. Tel. Co. When I first knew the telegraph line in 1859 along the W. & A. it was on the left hand side, looking towards Chattanooga, or the western side. [fol. 464] The line has continued in that position up to this time. During my knowledge of the W. A. R. R. both before the lease of 1870 and after the lease of 1870, the W. & A. R. R. was operated and used for no other purpose than as a railroad. The use of that railroad by the lessees after the lease of 1870, under that lease, and under the succeeding lease to all intents and purposes was the same as it was when operated by the State prior to 1870, as far as I know or could observe. The W. & A. while the State operated it, charged tolls for freights and passenger transportation the same as any other railroad.

---

J. W. LAWTON, sworn as a witness for defendant, testified:

Direct examination:

My first experience with the W. & A. was the distribution of telegraph poles and telegraph material between Chattanooga, Tenn., and Atlanta, Ga. for the purpose of erecting a telegraph line for the American Union Tel. Co. about 1880 or 1881. During that time I was passing back and forth between Atlanta and Chattanooga. I first went there in 1880 or 1881, as near as I can remember it. When I first went there to do this work there was another line constructed and in operation on the opposite side of the railroad from where we were building. The old line was on the *the* left hand side as you look to Chattanooga from Atlanta, that is, the west side. That line on the west side is where it was, and has been there continuously since my first knowledge. The line that I constructed has been there continuously ever since, the line that I constructed for the American Telegraph Co. on the opposite side on the eastern side, on the right hand side looking towards Chattanooga.

---

J. E. EUBANKS, sworn as a witness for defendant, testified:

Direct examination:

I was first employed by the W. U. Tel. Co. in 1871. That employment [fol. 465] ceased in 1894 or '95, somewhere along there. From 1871 to 1894 or '95, while I was employed by the Western Union, I was connected or employed in connection with the line of telegraph along the W. & A. between Chattanooga and Atlanta. I was so connected with it in the discharge of my duties pretty near all the time. I was lineman in Atlanta for most of the time. I had to go out on the road and repair those lines. In 1871 there was a line of telegraph along the railroad known as the W. & A. R. R. then between Atlanta and Chattanooga. Looking to Chattanooga,



it was on the left side, that is on the west side. The W. U. operated that line at that time. It has been there continuously since 1871. Since leaving the employment of the Western Union I have been along and over the line several times over the road. It has been there ever since. In 1880 or 1881, they built another line along there on the right side looking towards Chattanooga, that is, the eastern side.

GEORGE M. WILSON, sworn as a witness for defendant, testified:

Direct examination:

I am an attorney of the Atlanta bar. I have been practicing law in Atlanta since 1913. I made an examination of the records of the counties of Cobb, Bartow, Gordon, Murray, Whitfield, Catoosa, in Ga. for conveyances of record from Augusta, Atlanta & Nashville Magnetic Tel. Co. of record in any of these counties. I found one instrument of record in two of those counties. I don't recollect the terms and conditions of that instrument.

This examination was made in 1920, and I don't find in my letter any reference to the instrument that I found. Taking the counties one at a time. I reported nothing found in Cobb. That letter [fol. 466] (one exhibited to the witness) is two years back. It is a carbon copy of a letter written by me to Messrs. Brewster, Howell and Heyman. My present recollection is that I found none of the instruments named in the carbon copy of the letter. I having received the original, but that I did find some other instruments which my recollection is I reported to Messrs. Brewster, Howell & Heyman not named in the carbon copy of the letter. I did find the record of this deed (exhibiting deed from Hammett dated Sept. 1, 1859, copy of which is attached as Exhibit 3 to defendant's answer) as I recollect it, in two of the counties in which I made my examination. I found that in the clerk's office of the superior court of Catoosa county, in Book B, page 333. A copy of this original is what I recollect I found. That is the only record of any of the papers which I was looking for that I did find. I was instructed to make a search in the various counties named, for the following named instruments, and I did search for such instruments.

Contract entered into between Mitchell, chief engineer of the W. & A. R. R. and Messrs. Garst & Bean, entered into about the year 1850.

Transfer of this contract by Garst and Bean to the Augusta, Atlanta and Nashville Magnetic Tel. Company, about the year 1851 or 1852.

A mortgage executed by the A. A. & N. M. Tel. Co. to William Pylus and Samuel L. Scott, January 29th, 1855.

A mortgage from said telegraph company to J. Washburn & Co., January 29th, 1855.

Mortgage from said telegraph company to Samuel Clark, of the

county of Davidson, State of Tennessee, the 17th day of March, 1855.

Also for proceedings of foreclosure of said mortgages or any of them, and the sale of the telegraph properties of said telegraph company under foreclosure proceedings in any of the counties.

Also judgments of foreclosure for any levies on property, notice of sale, or deeds made after the sale.

Deed from Alvin D. Hammett of Marietta, Ga. August 12th 1858, to William S. Morris.

Deed from Hammett 1st day of Sept. 1858, to Morris, Langhorne and others.

Deed from Geo. L. Wolley, of Nashville, dated Nov. 13th, 1858, to Morris, Langhorne and others.

I believe that is all as to suits and various documents that I was to look for, and the only paper of any description is what I have stated that I found. The only paper of any description I found in the copy that I have identified I made a careful search. I made an examination of Cobb county, in Bartow county, in Gordon county, Murray county, Whitfield county, and in Catoosa county. Catoosa county, according to the records the first records that I found, showed it was organized about the year 1852. I fixed that date by looking at the first date of deeds and mortgages of records and the records of writs, minutes, etc. That county was cut out of Walker county, which is an adjacent county lying immediately west of Catoosa county. I examined the Catoosa county records. I did not examine the Walker county records, because my instructions only covered these counties I did examine. My recollection is I inquired of Mr. Heyman or Mr. Howell if they desired any further search made in the counties out of which the present existing counties had been carved. Walker county, while it originally included Catoosa, Catoosa was taken from Walker in the year 1852. I didn't go back of that into Walker. From that date I did go through the Catoosa records. Cobb county was organized prior to the year 1850. It was taken from Cherokee county, is my recollection. I did not examine in Cherokee, but in Cobb county from 1850 up, I did examine. [fol. 468] Bartow county was organized in 1850 likewise, as I recollect, out of the Cherokee county, Gordon county came out of Cherokee in the year 1848. I examined the records of the superior courts of the several counties in the counties in which I was examining. In the course of my examination when I found counties were carved from former existing counties, I found they were taken from other counties in which I was examining, about or prior to the time your search dated. I did not go to the trouble of looking into those old county records from which those particular counties were carved for the reason my instructions only covered certain designated counties, and I made by search of those counties as they exist at the present time, back to the time of their original organization as such counties. Where I found they were taken from other counties about the time or before the date my search was to begin, I did not then go to look into the counties from which they were taken. I found the records

of Cobb county at Marietta, beginning with the year 1863, the records prior to that time, from 1850, the organization of the county, to 1863, are missing, due to the destruction of the court house and of the records during the Civil War.

Cross-examination:

I found the record of the Hammett deed in only two counties is my recollection.

W. PERRY BLOODWORTH, sworn as a witness for defendant, testified:

Direct examination:

I am an attorney. I am connected with the firm of Dorsey, Brewster, Howell and Heyman, in this county. Perhaps I am more familiar with the land titles, and the records than any other branch [fol. 469] of the law. At Mr. Heyman's request I made an investigation of the records of Fulton county for the purpose of locating certain papers and documents.

Q. Were you able to find recorded in this county, in its records any contract between the chief engineer of the W. & A. R. R. and Garst & Bean?

A. I found only one paper recorded and that was a deed from Hammett to Marris and others made about 1858. That was the only paper, of the papers covered by this letter, which is the copy that I had to by. That was the only paper I found, after making search of the records, the indexes, direct and reverse, of the records of Fulton county. I found on the execution docket "A" of the superior court, the record of an execution in the case of Mills for use of Mills against the Augusta, Atlanta & Nashville Tel. Co.

Q. Look at this and state whether that is a correct statement of what you found on the execution docket?

A. It is.

Q. I notice on it a purported verdict, on the same paper, in that case, state whether you found that recorded verdict?

A. This is a copy of the verdict which I found recorded on the minutes. You requested me to have search made of the old documents in the court house and whether or not you found on file the original proceedings of which they purport a verdict and execution? You instructed me to search among the old documents. This paper (one exhibited to the witness) on the original petition in the suit where I found the record on the execution docket of that execution. I got that paper from the hands of the deputy clerk of Fulton superior court. I was present at the time he got it. He and I found it together in what we call the old boxes back in the basement, in the vault.

Q. In order to make it clear, I call your attention to an envelope marked No. 5259, and further identified by the words "Old Box" [fol. 470] and ask you where you got this paper and what was in it?

A. From the basement, in the vault in the office of the clerk of the superior court of Fulton county, Georgia, from the hands of Mr. Holland, deputy clerk of Fulton superior court. It was found in the basement of the vault of the office downstairs.

Q. I call your attention to another, with a paper, identified as No. 242, No. 20, April term, 1860, "Old Box" and ask you if you got this envelope with the paper in it anywhere?

A. I did. I got it from the basement of the vault in the office of the clerk of the superior court of Fulton county, Ga. from the hands of Mr. Holland, the deputy clerk of Fulton superior court. I was with him when he took this out of the box in which it had been located.

---

ARTHUR HEYMAN, sworn as a witness for defendant, testified:

Direct examination:

I prepared this original notice of condemnation (exhibiting it) to the W. & A. R. R. dated the 18th day of January, 1912, signed the W. U. Tel. Co. by G. W. Atkins, Vice President. I was connected with the law firm of Dorsey, Brewster, Howell and Heyman. In December, 1911 we had an inquiry, I think it was in December, from Mr. Fearons who was then general attorney of the W. U. Tel. Co. asking if we were in position to institute condemnation against the various lines controlled by the L. & N. R. R. in Ga., in which several roads were named. We replied that we were, and we were asked by Mr. Fearons to prepare the necessary notice, which we prepared, or rather which I prepared, and those notices were sent to New York, where they were signed by Mr. Atkins, Vice President, and returned to be served upon the various roads. We prepared a [fol. 471] notice to the W. & A. R. R., which is the lease name for the branch of the Nashville, Chattanooga & St. Louis Ry. At that time I was under the impression that the road between Rome and Kingston was a part of the Western & Atlantic R. R. I learned later that it was not and I dismissed the condemnation proceedings as to that. The first notice is directed to the W. & A. R. R. Company.

When I prepared this notice to the W. & A. R. R. dated Jan'y. 18th, 1912, signed by G. W. E. Atkins, vice-president of the W. U. (copy attached as Exhibit A to petition in case 24720 set forth above) I did not, at that time, have any knowledge of what right or title, or interest or easement in land the W. U. Tel. Co. possessed for the construction, maintenance and operation of its line of telegraph from Atlanta to Chattanooga, upon or along the W. & A. R. R. I don't know whether it had any such right, or if it had any, anything about it. When I prepared this amendment to that notice of condemnation I did not know what right, title or interest or easement in land, if any, the W. U. Tel. Co. had for the construction, maintenance and operation of its telegraph line upon or along the W. & A. R. R.

An assessor was not appointed or named by the W. & A. R. R.

Co. in response to the notice of condemnation to which I have referred or the amendments thereto. After this original notice of condemnation was served on the W. & A. R. R. Co., it filed a bill in this court, in Fulton superior court, No. 24,720. The W. & A. R. R. Company was plaintiff, and the W. U. Tel. Co. was defendant.

Q. At the time you prepared this notice of condemnation, and at the time you prepared the amendment to the notice of condemnation did you or not in point of fact, have any knowledge of what right or title the State of Ga. had to what is known as the W. & A. R. R.? [fol. 472] A. My only knowledge was the general information that the State of Ga. owned a railroad extending from Atlanta to Chattanooga, Tenn. what right of way they had, the character of the right of way, title to it, whether it was a title in land or easement for railroad purposes, about that I had no knowledge or information, and I made no investigation to ascertain what the character of it was. The condemnation proceeding was finally dismissed by a notice the original of which I hand you. I prepared the first notice of condemnation. I sent it to New York. The document which I had prepared in my office, the typewritten document which left my office, came back to me exactly as it was prepared by me. What I have seen here is the original which I prepared in my office. I don't think we sent the amendment to those condemnation proceedings to New York. I had it signed here. That amendment was signed by me in the name of my firm as attorneys for the W. U. Tel. Co. I signed it W. U. Tel. Co. by our firm as its duly authorized representative. The answer to the original bill in this court of the Western & Atlantic Railroad against the Western Union, No. 24720, and the answer and the amendment to that bill, were each prepared by me and signed by me in the firm name of Dorsey, Brewster, Howell and Heyman. I mean the amended answers to the bill. That is true of the motion to advance a hearing of that same case. The answer in the State of Ga. against the W. U. Tel. Co. No. 27274, Fulton superior court was prepared and signed by me. All these papers were filed in court properly.

---

II. C. WORTHEN, sworn as a witness for defendant, testified:

Direct examination:

I signed the affidavit to this answer and amendment to a petition in the case of W. & A. R. R. versus W. U. Tel. Co. No. 24720, in [fol. 473] Fulton superior court (the original being exhibited to the witness). My connection with the W. U. Tel. Co. at that time was general manager for the southern division.

L. H. Beck, who swore to an answer for the W. U. Tel. Co. in this court, No. 24720 is division plant superintendent of the southern division, W. U. Tel. Co. He is now in St. Joseph's hospital. He has just been operated on for adhesions following an operation for appendicitis. He has had an abdominal incision. He cannot be seen now, and cannot be for some time. The character of Mr.

Beek's duties as an employee of the W. U. was this: He had charge of the maintenance, construction and reconstruction of all telegraph lines outside the plant and inside the plant. He had been employed by the W. U. less than a year prior to that time. I would like to correct that. He came south in 1910, but his first position, I don't know the date of that.

G. W. E. ATKINS, recalled as a witness for defendant, testified:

Direct examination:

I knew James D. Reid.

Q. Please look at this book called "The Telegraph in America," by James D. Reid, and state if you knew the author of it?

A. I did; I knew him for some time before he died. He died perhaps eight or ten years ago. I don't remember the date. He had been connected with telegraph companies fifty or sixty years, or perhaps a little more, I don't know just how long. This agreement dated the 12th day of June, 1866, between the American Telegraph Co. of the one part and the W. U. Tel. Co. of the other (exhibited to the witness copy of which is attached as Exhibit 6 to defendant's answer) is in J. D. Reid's handwriting. I know it well. That book written by Reid is a book generally regarded by the public, and [fol. 474] particularly those connected with the various telegraph companies, as an authentic and worthy of credence and belief.

— Mr. Atkins, please look at this letter signed William McRae, Supt., and the paper attached to it, and state where it came from.

A. It came from the files of the W. U. Tel. Co. in New York.

Q. When did you first know of that being there?

A. Well, I could not tell you just when, but it has been quite a long time. The papers are dated in 1876, I don't know when I first saw them. I think I brought them here from New York myself. These are part of our ancient records I might have seen them 20 years ago or 30 years ago, or later, I don't know when.

Q. I am handing you notice of the W. U. Tel. Co. to the W. & A. R. R. dated January 18th, 1912, signed W. U. Tel. Co. by G. W. E. Atkins, vice president. Will you please look at that and say who signed that?

A. I signed it. Before that time I made no investigation to ascertain what right, title or interest that State of Ga. had to what is known as the W. & A. R. R. right of way.

Q. At that time, Mr. Atkins, what did you know about what kind of right or title the W. U. had in land and easements in lands upon, or along the W. & A. R. R. for the construction of its lines of telegraph then operated and constructed along the W. & A. R. R.?

A. I didn't know anything about it because I hadn't investigated it, I hadn't gone into it.

G. W. E. ATKINS, recalled as a witness for defendant, testified:

Direct examination:

I knew James D. Reid. I knew the author of this book called [fol. 475] "The Telegraph in America," James D. Reid. I knew him for some time before he died. He died perhaps eight or ten years ago, I don't remember the date. He had been connected with telegraph companies fifty or sixty years, or perhaps a little more; I don't know just how long. That old book I referred to marked "C" contains no handwriting of Mr. Reid. This agreement dated the 12th day of June, 1866 between the American Tel. Co. of the one part, and the W. U. Tel. Co. of the other (exhibited to the witness, copy of which is attached as Exhibit 6 to defendant's answer), is in J. D. Reid's handwriting; I know it well. That book, written by Reid, is a book generally regarded by the public, and particularly those connected with the various telegraph companies, as an authentic and worthy of credence and belief. This letter signed William McRae, superintendent, and the paper attached to it come from the files of the W. U. Tel. Co. in New York, I could not tell just when I first knew of its being there but it has been quite a long time. The papers are dated in 1876, I don't know when I first saw them. I think I brought them here from New York myself. These are part of our ancient records. I might have seen them 20 years ago or 30 years ago, or later; I don't know when. I signed this notice of the W. U. Tel. Co. to the W. & A. R. R. Co. dated January 18th, 1912, signed W. U. Tel. Co. by G. W. E. Atkins, Vice President, being the notice of condemnation, copy of which is set forth elsewhere herein. At that time I did not know anything about what kind of right or title the W. U. had in land and easements in lands upon or along the W. & A. R. R. for the construction of its lines of telegraph then operated and constructed along the W. & A. R. R. I hadn't investigated it, I had gone into it.

#### EXHIBIT IN EVIDENCE

The following letter from the Nashville, Chattanooga & St. Louis [fol. 476] Ry. to the W. U. Tel. Co., dated August 7th, 1890, was put in evidence.

"Nashville, Chattanooga & St. Louis Railway

Office of President & General Manager

Nashville, Tenn., Aug. 7, 1890.

"Jas. Compton, Esq., Supt. W. U. Tel. Co., City.

"DEAR SIR: Referring to Section 5 of the contract existing between the W. U. Tel. Co. and the Nashville, Chattanooga & St. Louis Railway, would respectfully advise you that within six months we wish a



telegraph line built from Attalla to Guntersville, a distance of 25 miles, on the line of the Tennessee & Ciosa Railroad, which is now being constructed by this company. We also with the line extended from Dunlap to Pikeville, a distance of 20 miles; and also *which* the provisions of this contract extended on January 1st, 1891, over the W. & A. R. R. from Chattanooga to Atlanta, this company having leased that property for a period of 29 years.

Yours truly, J. W. Thomas, President."

A letter dated August 14, 1912, from N. C. & St. L. Ry. by its president J. W. Thomas was introduced in evidence:

"August 14, 1912.

"To the W. U. Tel. Co. of New York:

"You are hereby notified by the undersigned, the N. C. & St. L. Ry., that on and after August 17, 1912, the use and occupation by you of its present rights of way, or any part thereof, situated in the State of Tennessee, Kentucky, Georgia and Alabama, and of its buildings, offices, stations and premises, or any part thereof, as and for a telegraph line composed of poles, cross arms, wires, batteries, [fol. 477] instruments, appliances and other fixtures, will be without its permission and against its will and consent.

"You are hereby further notified to vacate its said railroad rights of way, buildings, offices, stations and premises, and to commence in good faith to remove therefrom immediately after Aug. 17, 1912, and not later than September 1, 1912, all and singular the said poles, cross arms, wires, batteries, instruments, appliances and other fixtures composing your said telegraph line now and heretofore erected, operated and maintained by you under the provisions of the written contract, dated June 18, 1884, between you and the undersigned company, which you, by your written notice, dated August 11, 1911, and received by the undersigned company Aug. 17, 1911, voluntarily terminated upon the expiration of one year thereafter, to wit, on August 17, 1912, but this notice as to removal does not include the line of poles located upon the right of way of this company between Nashville and Chattanooga and Wartrace and Shelbyville, as said line of poles, and the cross arms upon which the wires belonging to this railroad company are strung, are the property of this company; but it does include all wires of the W. U. Tel. Co. between Nashville and Chattanooga and between Wartrace and Shelbyville, strung upon said poles, all cross arms upon which the wires of the railroad company are not strung, as well as the batteries, instruments, appliances and other fixtures on said line of railroad belonging to the telegraph company.

"You are hereby further notified and required to diligently and continuously prosecute said work of removal from its commencement as aforesaid, and to complete the same prior to December 1, 1912, and to enable you to do so within the period the undersigned company hereby offers and undertakes to furnish all necessary and [fol. 478] suitable engines and cars for that purpose, such cars to be

loaded by your employes at and between stations on each of its several lines or divisions of railroad in said States, at such point thereon and at such times as may be reasonably designed by you in writing delivered, with proper shipping directions, to its general manager the undersigned company being afforded a reasonably opportunity to detach and remove its own wires, fixtures, etc. on such poles and to keep out of way in said work of removal on your part; the undersigned company further offers and undertakes to transport the said poles, cross arms, wires, batteries, instruments, appliances, and other fixtures thus loaded at its regular legal rates to destination, if on its own lines, and, if not, then to deliver the same to its connecting lines, as in the case of the carriage of like commodities and materials for other shippers.

"You are hereby further notified that in the meantime and before you shall have effected such removal as aforesaid, all service rendered by you for or to the undersigned company, its officers, agents or employes, in the transmission of messages on or in the conduct of its business by telegraph over your wires in said telegraph line, or any portion thereof, or over any other telegraph line owned and operated by you, and in the receipt and delivery of such messages, will be paid for by the undersigned company in cash or at the end of each month during said period between August 17 and December 1, 1912, at our regular legal rates and charges, for like service rendered to other patrons; the between the dates last named the undersigned company will accept for furnishing office room and operators to transact your commercial business at points where you do not maintain a separate office 25% of the receipts for messages received and forwarded to one of your officers or received from one of your officers [fol. 479] and delivered to addressee and 50% of the receipts when received and delivered by the agent of the undersigned company until your said telegraph line connecting therewith shall have been removed as aforesaid, but in no event longer than November 30, 1912; that the undersigned company will also in like manner pay you the reasonable value of the use of your wires as it may continue to use along its said lines of railroad, and in cities and towns along the same or at the termini thereof after August 17, 1912, and prior to December 1, 1912, and for the use, if any, of the instruments, main and local batteries, terminal facilities, testing service etc. for the operation of such wires as the undersigned owns on said poles, as well as for such other services as you may perform for it between the dates last named.

"You are hereby further notified that for all transportation and other services rendered by the undersigned company to or for you, or your officers, agents or employes, after August 17, 1912, the undersigned company's regular legal rates and charges will be charged and collected from you in cash or at the end of each month during the period aforesaid.

"You are hereby further notified that all officers, agents and employes of the undersigned company to whom you have issued franks for the current year, by which their messages over your telegraph lines on or for the conduct of the business of the undersigned com-

pany, will be instructed to return to you such franks on or prior to August 17, 1912; and you are hereby requested to instruct all of your officers, agents, employes to whom the undersigned company has issued passes for the current year over its lines or any of them, to return such passes to its general manager on or prior to the last named date.

"You are hereby further notified that for your continued use and occupation, as and for a telegraph line, of the undersigned company's [fol. 480] said rights of way, buildings, officers, stations, and premises, or any part thereof, in said states, or either of them, and for the use of this company's poles between Nashville and Chattanooga and between Wartrace and Shelbyville, after August 17, 1912, and prior to December 1, 1912, you will be held liable and required to pay to the undersigned company the full value thereof, as well as all damages it shall sustained by reason or on account of being prevented from erecting, operating and maintaining its own telegraph or telephone line where the same has been located on its said right of way, and by reason and on account of such use and occupation of its said rights of way and premises by you against its will and consent, and wrongfully and without right after the termination of said existing contract.

"You are hereby further notified that in default of your vacating the undersigned company's said rights of way and premises or in the event of your failure or refusal to remove therefrom your poles, cross arms, wires, batteries, instruments, appliances and other fixtures aforesaid, or any part thereof, prior to December 1, 1912, as in this notice hereinabove set forth, then, and in that event the undersigned company will take possession appropriate and use all and singular the said poles, cross arms, wires, batteries, instruments, appliances, and other fixtures, or so much thereof as may on or before the last named date be or remain on the undersigned company's said rights of way or premises in all or either of said States, and hold, use, operate, maintain or otherwise dispose of the same as its own property, and refuse to longer permit you to remove or use the same in any manner or for any purpose, and will use all legitimate means in its power to prevent you from interfering with its possession, use and ownership thereof.

"You are hereby further notified that inasmuch as the undersigned [fol. 481] signed company cannot erect its own telegraph or telephone line where the same has been located on its said rights of way while your telegraph line is there operated and maintained, the undersigned company will be of necessity compelled to make use of your existing telegraph poles and wires thereon for the transmission of messages in the conduct of its railroad business until your said line is removed therefrom as hereinabove set forth, you will understand that such compulsory use of your poles and wires is not and must not be construed to be an acquiescence by the undersigned company in your continuance upon or continued use and occupation of its rights of way.

"In witness whereof, the Nashville, Chattanooga & St. Louis Ry. has hereunto caused its name to be subscribed by J. W. Thomas, Jr.,

its president and its official seal to be affixed by A. M. Martin, its Assistant Secretary, this the date first above written.

"The Nashville, Chattanooga & St. Louis Ry., by J. W. Thomas, President. Attest: A. M. Martin, Asst. Secretary."

---

JOHN S. HOLLADAY, sworn as a witness for defendant, testified:

I am deputy clerk of this county. This is the bar docket of this court which I hold in my hand. The last entry therein in the case of the W. & A. R. R. Co., Va. the W. U. Tel. Co., in this court, known as 24720, is an entry of Oct. 6, 1914, entering the remittitur from the Supreme Court of Georgia and a judgment of this court thereon.

The remittitur is dated September 30, 1914, and was certified by the clerk of the Supreme Court of Ga., Oct. 5th, 1914. This is the [fol. 482] last entry in this case, with the exception of the amendment to defendant's answer and the amendment to defendant's motion to advance the hearing with the order of this court in each, each of which were filed in this court May 19, 1922, but entries thereof have not yet been made on this bar docket.

The last entry on this bar docket in the case of State of Ga. v. W. U. Tel. Co. in this court, known as 27274, is an entry of Oct. 6, 1914, entering the remittitur from the Supreme Court of Ga. and a judgment of this court thereon. The remittitur is dated Sept. 30th, 1914, and was certified by the clerk of the Supreme Court of Ga. Oct. 4, 1914. This is the last entry in this case, with the exception of the amendment to defendant's answer with the order of this court, which was filed in this court May 19th, 1922, but entry thereof has not yet been made on this bar docket.

---

#### EXHIBITS IN EVIDENCE

Counsel for plaintiffs in this place stated that the plaintiffs admitted that the case of the W. & A. R. R. v. W. U. Tel. Co. known as No. 24720, and the case of the State of Ga. v. W. U. Tel. Co., known as 27274, brought in this court, are still pending in this court, and that the W. U. Tel. Co. had given notice that the two condemnation proceedings which those suits were brought to enjoin had been dismissed by the W. U. Tel. Co. which had given notice to that effect.

The certified copy of the charter of the W. U. Tel. Co. was introduced in evidence with certified copies of the acts of the State of New York under which it was incorporated, the material parts of which are, or the substance of the material parts of which are, the act of the general assembly of New York passed April 12th, 1848, entitled "An act to provide for the incorporation and regulation of telegraph companies."

Sections 11 and 12 of which are:

[fol. 483] "It shall be the duty of the owner of the association owning any telegraph line, doing business within this State, to receive dispatches from and for other telegraph lines and associations and from and for any individual, and on payment of their usual charges for individuals for transmitting dispatches, as established by the rules and regulations of such telegraph line, to transmit the same with impartiality and good faith, under the penalty of one hundred dollars for every neglect or refusal so to do, to be recovered with costs of suit, in the name and for the benefit of the person or persons sending or desiring to send such dispatch."

"It shall likewise be the duty of every such owner or association to transmit all dispatches in the order in which they are received, under the like penalty of one hundred dollars, to be recovered with costs of suit, by the person or persons whose dispatch is postponed out of its order, as herein prescribed; provided, however, that arrangements may be made with the proprietors or publishers of newspapers, for the transmission for the purpose of publication of intelligence of general and public interest, out of its regular order."

A part of section 1 of an act of the general assembly of New York passed June 29, 1853, entitled "An act to amend an act, entitled 'An Act to provide for the incorporation and regulation of telegraph companies,' passed April 12, 1848"

Section 1. Any number of persons may associate, for the purpose of owning or constructing, using and maintaining a line or lines of electric telegraph, whether wholly within or partly beyond the limits of this State; or for the purpose of owning any interest in any such line or lines of electric telegraph or any grants thereof, upon such [fol. 484] terms and conditions and subject to the liabilities prescribed in the act passed April 12th, 1848, entitled "An act to provide for the incorporation and regulation of telegraph companies."

Section 1 of an act of the general assembly of New York passed April 8th, 1851, entitled "An act to amend an act, entitled 'An act to provide for the incorporation and regulation of telegraph companies,' passed April 12, 1848."

"Section 1. The directors or trustees of any telegraph company formed or incorporated under the act, entitled 'An act to provide for the incorporation and regulation of telegraph companies,' passed April 12, 1848, may, at any time, with the written consent of the persons owning two thirds of the capital stock of such company, extend their line of telegraph or may construct branch lines to connect with their main lines, or may unite with any other incorporated telegraph company."

The following portions of an act of the general assembly of New York passed April 22, 1862, entitled "An act further to amend the act entitled 'An act to provide for the incorporation and regulation of telegraph companies,' passed April 12th, 1848."

"Section 1. Any telegraph company which is duly incorporated under and in pursuance of the act, entitled 'An act to provide for the incorporation and regulation of telegraph companies,' passed April 12th, 1848, may construct, own use and maintain any line or lines of electric telegraph not described in their original certificate of organization, whether wholly within or wholly or partly beyond the limits of this State, and may join with any other corporation or association in constructing leasing, owning, using or maintaining such line or lines, and may own and hold any interest in such line or lines, and may become lessees of any such line or lines, upon [fol. 485] the terms and conditions and subject to the liabilities prescribed in said act, so far as such provisions are applicable to the construction, using, maintaining, owning or holding of telegraph lines, or any interest therein pursuant to the provisions of this act."

"Sec. 3. Any telegraph company incorporated as mentioned in the first section of this act, which before the passing of this act shall have purchased, constructed or leased or shall have joined with any other corporation or association in the purchase, construction or leasing, or shall have become the owner or holder of any interest in any line or lines of telegraph not described in their original certificate of organization, may, within one year after the passage of this act, make and file in the office of the secretary of State such certificate as is provided in the second section of this act, and upon the filing of such certificate, their act if otherwith within the provisions of this statute, shall be as valid and effectual as if done after the passing of this act, saving all existing rights of other persons."

The following portion of an act of the general assembly of New York passed May 2nd, 1870, entitled "An act in relation to telegraph companies:"

"Section 1. In order to perfect and extend the connections of telegraph companies in this State, and promote their union with the telegraph companies in this State, and promote their union with the telegraph systems of other States any telegraph company organized under the laws of this State may lease, sell or convey its property rights, privileges and franchises, or any interest therein, or any part thereof to any telegraph company organized under, or created by, the laws of this or any other State, and may acquire by lease purchase or conveyance the property rights, privileges, and franchises or any interest [fol. 486] therein or any part thereof, or any telegraph company organized under, or created by, the laws of this or any other State, and may make payments therefor in its own stock, money, or property, or receive payment therefor in the stock, money or property of the corporation to which the same may be so sold, leased or conveyed."

Articles of association and incorporation of New York & Mississippi Valley Printing Telegraph Company filed pursuant to the laws of New York with the secretary of State of New York, material portions of which are:

"Art. 1. The name of the said company shall be the 'The New York and Mississippi Valley Printing Telegraph Company.'"

"Art. 6. This company shall commence on the first day of April, 1851, and terminate on the first day of April, 1951."

"Art. 20. The board of directors, with the consent of two-thirds of all the members thereof, whose names are to be entered in the minutes of their proceedings, may merge or unite this line with any other telegraph line or lines which may be authorized to use House's Printing Telegraph, on such terms as shall appear just and equitable; and the stockholders in this company shall be entitled to at least the same amount of stock in the said incorporated company, to which this company shall be united, as they were respectively entitled to in this company.

"The said directors with the like consent may also purchase for the company any line or part of a line of telegraph already constructed, to from a part of this line, if, in their judgment, such purchase will be for the benefit of this company.

"And in case of any such purchase or purchasers, so much of the cost thereof as would be equal to the cost of the same extent of new [fol. 487] structure, shall be borne by the said Sanford J. Smith and Isaac Butts, and the balance, if any, shall be chargeable to the association.

"The said directors may also lease for this company, any line or part of a line of telegraph, if, in their judgment, such leasing will be for the benefit of this company."

Resolutions of the board of directors of the New York and Mississippi Valley Printing Telegraph Company, adopted at a meeting held in the State of New York, January 20th, 1854, that said corporation organize under the laws of New York, passed June 20th, 1853, and April 12th, 1848, in order that said company may become a body corporate and be entitled to the benefit of those acts upon the filing in the office of the Secretary of State of New York a certificate of a resolution adopted by a majority of that board of directors to organize under said last mentioned act the further resolution that the name of the corporation be "The New York & Mississippi Valley Printing Telegraph Company," that said company commence as a body corporate January 20th, 1854, and terminate on the first day of April, 1951.

An act of the general assembly of New York passed April 4th, 1856, entitled "An act to change the name of the New York and Mississippi Valley Printing Telegraph Company" which act changed the name of said corporation to that of the "Western Union Tel. Co."

The above mentioned acts of the general assembly of New York and of said resolution were duly certified by the Secretary of the State of New York to be true and correct copies of the originals of file in his office.

Defendant put in evidence plaintiffs not objecting, the resolution of the general assembly of Ga. approved Dec. 20th, 1893, entitled "Relief of Alex. Sauceman, No. 34" (Ga. Laws 1893, page 503), to wit:



[fol. 488] "Whereas, the State, by recent survey of the right of way of the W. & A. R. R. lays claim to property along said road bed heretofore held by citizens of the State in ignorance of such claim; and

"Whereas, said right of way of the road is of the uniform width of sixty-six feet through the State, except through one lot of land, to wit, number thirty in the twenty-eight district and third section of Catoosa county, which particular right of way was obtained by the State in 1841, from one Richard Jones; and

"Whereas, all record of such right of way was destroyed by the war, if it was ever on record, in Catoosa county, and, therefore, citizens could not have notice of any claim of the State to more than the ordinary width of right of way, to wit, sixty-six feet, which is the uniform width, except as to this particular lot, and

"Whereas, said extra width of right of way is of no material value to the State, sixty-six feet being ample for all railway purposes at this point, and

"Whereas, dispossession proceedings have been commenced against Alex. Sauceman, a citizen of the county of Catoosa, and a poor laboring man, who owns a house and lot encroaching on said right of way; said house and lot having been purchased by him in ignorance of any claim of the State to such extra width of right of way through this particular lot, the property he purchased having passed through more than five different owners' hands in the past, twenty-five years, and is duly recorded at Ringgold, in said county, in the record of deeds, so that the fully examination of title did not reveal to him any claims against this property, and

"Whereas, the extra width of right of way would include one-half of his lot and dwelling house, and destroy the value of his property, [fol. 489] entirely leaving a poor man homeless without any opportunity to recover the loss sustained from any one, therefore be it

"Resolved, by the House of Representatives, the Senate concurring, that the State's Attorney be, and is, hereby instructed to dismiss said dispossession proceedings against the said Alex. Sauceman, provided, that the foregoing resolution shall not become operative until said Alex. Sauceman has filed in the clerk's office of the county, a full and complete disclaimer of title to said land; provided the adoption of this resolution shall not in any manner affect any right the present lessees may have in said property.

"Approved December 20th, 1893."

#### REBUTTAL EVIDENCE FOR PLAINTIFFS

Plaintiffs introduced in evidence the following portions of subparagraph 10 of paragraph 6 of the answer of the W. U. Tel. Co. in this case which was stricken by Judge Pendleton, to wit:

"By a contract dated August 18th, 1870, between the W. U. Tel. Company and the W. & A. R. R. executed in behalf of the W. & A.

R. R. by its superintendent and approved by the Governor of Ga., under the seal of the State, the State of Ga. granted and conveyed to the W. U. Tel. Co. a 'perpetual right of way to erect and maintain telegraph lines along said railroad of as many wires as it may deem necessary to its business, and additional lines of poles whenever' the W. U. Tel. Co. shall so elect."

---

## IN FULTON SUPERIOR COURT

### ORDER SETTLING BRIEF OF EVIDENCE

The foregoing brief of evidence is hereby approved as true and correct. Let it be filed. In open court this Oct. 30th, 1922.

W. D. Ellis, Judge S. C. A. C.

[File endorsement omitted.]

---

[fol. 490]

## FULTON SUPERIOR COURT

[Title omitted.]

Trial May 15, 16, 17, 18, 22, 23, 24, 25, 26, 29, 30, 31, June 1, 2, and 5th, 1922

### CHARGE OF THE COURT—Filed Oct. 31, 1922

GENTLEMEN OF THE JURY: The object of a trial is to administer justice between litigants and according to law. There can be no adjustment of any controversy, proper adjustment of it, without some rules to go by. If we had a different set of rules to apply, no two cases would probably be adjusted, alike, and so we have rules applicable to the trial of cases, and the trial of a case is divided into two grand divisions; Questions of law which are for the Court; the Court gives you the law of the case; and questions of fact—that is to say what is proven or disproven—what is the truth of the case as to the facts that are presented. This is a matter peculiarly transferred to the jury. You are the exclusive judges of the facts of the evidence and the weight of the evidence.

The judges has no right to determine any question of fact in the trial of a case—that is for the jury to decide.

In the trial of cases there must necessarily be some method of procedure, how a case shall be brought, how it shall be stated, what the rights of the plaintiff are must be stated in his complaint or petition, according to his vision of it, and the defendant's side of the controversy must be stated too. The defendant must set up in his answer—or if it is a corporation—in its answer, what its denials are, what its admissions are, if any, and what its contentions are.

[fol. 491] The law does not require, in the determination of a civil case, mathematical certainty; but reasonable and moral certainty is all that is required.

Now, you take up the question of the pleadings in the case, Plaintiff comes in and alleges a whole lot of things in its behalf, alleges its contentions and its claims and demands, and the defendant has the right to come in and do what we call "demur" to the plaintiff's petition. The defendant would have the right to say that the plaintiff has stated no case, if you took for granted everything the plaintiff said, it still would have no right to recover. The defendant might say that, or it might not say that, or say that and say further that the plaintiff has incorrectly stated his propositions or his demands; that he has stated them in an illegal form and that the Court ought to strike them, because they are irrelevant to the issue; or that they did not meet the requirements of the plaintiff's case.

So, when the defendant filed his answer, or its answer, the plaintiff has a right to object to that. The plaintiff has a right to move to strike all of the defendant's answer, or a part of the defendant's answer.

These are just passing explanations to you to show how you get down to the situation which you have before you.

Now, as to what is proper evidence in the case, whether it is admissible or not, whether after having been spoken or read or proven it should be ruled out, all that goes to the judge — has to determine that. Hence, if there is any evidence in the case that the plaintiff or the defendant moved to rule out that is addressed to the discretion of the judge, and he must determine it, and if he rules it in, it is to be considered by the jury, no matter what the other side says about it. If he rules it out, it is not to be considered by the jury; then, it is not a part of the case, it is gone.

[fol. 492] So, with the pleadings, if the Court strikes a part of the plaintiff's petition why, that is conclusive, that that stricken part is not a part of the plaintiff's case. If he were to strike all of the plaintiff's petition that would end the case and the plaintiff of course could not recover.

So it comes to where the defendant files answer. The plaintiff can come along, if it wants to and say that we demur to this part of the answer, or to that part of the answer. That is, we say that ought to be stricken from the case and ought not to be submitted to the jury, and if the judge agrees with the plaintiff in his complaint of the defendant's answer and rules out any part of it, or sustains a demurrer to it, that part of it is gone. That part of it is still in the papers, in the writings, but it is not there for the consideration of the jury.

Now, these pleadings are very voluminous. I can't take a pen or eraser and mutilate this record so as to get out of it things that have been stricken on demurrer. I could not take the plaintiff's case and say that all I have marked out is gone and mutilate it so it could not be seen afterwards what has been taken out; nor could I take defendant's answer and say, for instance, that paragraph 5, 6 or 10 was stricken and take it out; you can't mutilate the record. The best the Court can do is to take this record and go over it and tell you what has been stricken from it, if anything. And, you will remember that what the Court says has been stricken is not in the

case. It is still in this record, the writing is there, but the Court will undertake to mark around or designate parts of the pleadings that have been stricken on demurrer, and you gentlemen will understand that that part which is stricken is not in the case unless there be instances, if there are any, where parts of the stricken answer, or something has been tendered in evidence, not as pleadings, but as admissions, if any such things as that occur.

The object of a trial is to discover the truth and you are the exclusive judges of what is the truth of the case, the facts of it, and you [fol. 493] are to look to the evidence in the case.

Now, what has been introduced in evidence and what has been admitted for you to consider has been determined by the Court; the Court being the arbiter of what is proper evidence in the case and what, if any evidence presented, ought to be rejected.

The object of a trial, as I say, is to discover the truth and this must be done according to the principles of law as given you by the Court and the opinion you entertain of the evidence.

You gentlemen have listened carefully to the evidence in the case. You did that for the purpose of trying to understand what the evidence is; trying to find the truth of the case and you are to find your verdict according to the opinion you entertain of the evidence produced to you and according to the law as given you in charge by the Court.

And as you gentlemen listened to the evidence to find out what the facts were, now it is necessary for you to listen carefully to the charge of the Court and try to understand what the law is.

Lawyers may differ, and do differ very widely, as you know, about what the law is in certain matters and about the effect of certain evidence in the case, but the law of the case you are trying is the law as given you by the Court. Whatever the judge says about the law is to rule, that is to rule, that is to govern.

There are various kinds of evidence—direct, positive evidence, circumstantial evidence, written evidence, documentary evidence and various other kinds of evidence that you have heard mentioned and will be mentioned to you, and you must apply these rules of evidence in getting at what the truth of the case is as to the facts.

This case started by the filing of a petition in this Court by the State of Georgia as owner of the Western & Atlantic Railroad; it is claimed to be the owner, and the Nashville, Chattanooga & St. Louis Railway, as lessee from the State of said Western & Atlantic Railroad [fol. 494] and operating the said railroad under the corporate name and style of Western & Atlantic Railroad and these two Plaintiffs—that is to say the State of Georgia and this railroad, this alleged lessee, brings this suit against the Western Union Telegraph Company, alleged to be a corporation.

In the first paragraph of this petition, the State of Georgia claims that it is the sole and exclusive owner of the Western & Atlantic Railroad, the same being a railway communication, together with its rights of way and properties, extending from the city of Atlanta in the State of Georgia, through the Counties of Fulton, Cobb, Bar-

tow, Gordon, Whitfield, and Catoosa, in the State of Georgia, and the county of Hamilton, in the State of Tennessee, to the city of Chattanooga, Tennessee.

The petition charges that this railroad was constructed as a great public work by the State of Georgia solely out of public funds; and the petition says that all of the property appertaining to this railroad, including its right of way and terminals, as exclusively owned by the State of Georgia directly and immediately, in its sovereign or governmental capacity.

The Petition charges that said railroad has never been incorporated, nor has it any capital stock, nor does it constitute a legal entity; it is public property and the income derived therefrom constitutes a part of the public revenue and is under the laws of the state devoted to public uses.

In the second paragraph of this petition the Nashville Chattanooga and St. Louis Railway is alleged to be a corporation of the State of Tennessee and that it operates the said Western & Atlantic railroad under a lease from the State of Georgia, as hereinafter specified, under the corporate name of the Western & Atlantic Railroad.

In the third paragraph of this petition it is alleged that the Western Union Telegraph Company is a foreign corporation engaged in the business of transmitting intelligence by wire, having and maintaining offices and agents and conducting business in the city of [fol. 495] Atlanta and county of Fulton, and in the other counties above enumerated through which it is alleged the Western & Atlantic Railroad runs.

In the 4th paragraph of this petition it is alleged that the Western & Atlantic Railroad was for a number of years operated directly by the State through its legislative and executive departments,—that is to say, until the 27th day of December, 1870, when said railroad was leased to and operated by a private corporation known as the Western & Atlantic Railroad Company, for a term of 20 years pursuant to an act of the General Assembly of the State of Georgia, approved October 25th, 1870; and reference is made to the act of the legislature, as to that.

The plaintiff further charges that upon the expiration of the lease in the foregoing paragraph referred to, to wit, on the 27th day of December, 1890, the said Western & Atlantic Railroad, together with its rights, ways and properties was leased to the Nashville, Chattanooga & St. Louis Railway for the term of 29 years then next ensuing. The said lessee company becoming under the law a corporation of the State of Georgia under the name and style of the Western & Atlantic Railroad Company, said lease being made pursuant to an act of the General Assembly, approved November 12th, 1889, and reference is made there to this act of the legislature as being on page 362 Acts of 1889, and reference is prayed thereto.

Paragraph 5th of this petition charges that under and pursuant to an act of the General Assembly of Georgia approved November 30th, 1915, and amendments thereto, providing for the lease, or other disposition of the Western & Atlantic Railroad the said West-

ern & Atlantic Railroad was again leased to the said Nashville, Chattanooga & St. Louis Railway for a term of 50 years, beginning December 27th, 1918, as evidenced by a certain contract of lease dated May 11th, 1917, said contract of lease being pursuant to the requirements of said Act, duly recorded on the minutes of the Executive Office of the State of Georgia as a public record, to which reference [fol. 496] is prayed.

The plaintiffs go on then and charge that the defendant the Western Union Telegraph Company is maintaining and operating over, upon and along the right of way of the Western & Atlantic Railroad between the city of Atlanta, Georgia, and the City of Chattanooga, Tennessee, telegraph lines, poles, wires and other appurtenances employed by it in the conduct of its telegraph business.

Petitioners charge that said use and occupation of said right of way is without authority from the State of Georgia and is contrary to the will and consent of the Nashville, Chattanooga, & St. Louis Railway the other plaintiff, and lessee, and that the same constitutes an unlawful encroachment upon the right-of-way of the Western & Atlantic Railroad and is adverse thereto.

In the 7th paragraph of this petition these plaintiffs claim that the continued use of this right-of-way by the defendant is in derogation of the rights of the State and State's title thereto, and operates adversely to the rights and interests of the lessee, the Nashville, Chattanooga & St. Louis Railway and they charge that said use and occupation by the defendant is without warrant in law and constitutes a continuing trespass and a constantly recurring grievance.

In the 8th paragraph it is charged by the Plaintiff that the General Assembly of Georgia adopted an Act approved November 30th, 1915 creating the Western & Atlantic Railroad Commission for the purpose and with the power and duties therein expressed and that by an amendment to said Act approved August 4th, 1916, the said Western & Atlantic Railroad Commission was given full power and authority, in its discretion, to deal with and dispose of any and all encroachments upon the use and occupancies of any part of the right-of-way and properties of the Western & Atlantic Railroad, whether such use and occupancy be permissive or adverse, and whether with or without a claim of right therefor; and the Commission was further authorized and fully empowered to take such action as it might [fol. 497] deem proper and expedient to cause the discontinuance of any such use, and authorize and empower to institute proceedings in the name and on behalf of the State of Georgia, and it is claimed in this petition that under and by virtue of that authority granted by the State that this suit was instituted and is now pending.

It is charged in paragraph 14 of the lease contract of May 11th, 1917, that the State expressly reserves to itself the right to remove and cause to be discontinued any and all encroachments or other adverse use and occupancies in and upon the right-of-way or other properties of the Western & Atlantic Railroad, or any part thereof, whether maintained under claim of right, or otherwise and to this end the Nashville, Chattanooga & St. Louis Railway, as lessee, con-



sented that the State may withhold delivery of possession, or right of possession of such parts of the right-of-way and other properties as may be so adversely used and occupied. In other words, the State claimed that it had the right to remove any encroachments upon its properties or rights, or right-of-way of the Railroad and that it would exercise that right when it saw proper so to do, and whatever its rights, if they were exercised and the State succeeded, they would inure to the benefit of this railroad leasing company and the leasing Company agreed to that proposition, that it would take this property under the lease, and take it subject to any legitimate claim that anybody else could establish against it, if they prevailed in a controversy with the State, but if the State prevailed in the controversy it would inure to the benefit of the leasing company, and hence the leasing Company's interest in this controversy.

Pursuant to the authority and direction of said Act and in accordance with paragraph 14 of the lease contract the Western & Atlantic Railroad Commission authorized and directed this suit to be brought provided that this railroad company would join in it and with the further provision that the railroad company, as it was to get the benefit if there was any, in securing this easement, or at least its [fol. 498] contention that it made as to its rights to have this defendant company remove its property, if it had any on it, from this railroad, would inure to the benefit of this leasing company, that the leasing company would pay the expenses of the litigation, and then it is alleged that the Nashville, Chattanooga & St. Louis Railway as lessee of the Western & Atlantic joins in this petition.

The prayer in this petition is that the Court will render its judgment and decree declaring the defendant, the Western Union Telegraph Company, to be without lawful right or authority to use and occupy any portion of the right of way of the Western & Atlantic Railroad as and for the purpose hereinbefore described or for any other purpose, and commanding the Western Union Telegraph Company to forthwith cease and wholly desist from the said use and occupation and that there be restored to this leasing railroad company unrestricted use and enjoyment of the right of way free from the adverse claim of the Western Union Telegraph Company.

Second, that the defendant, the Western Union Telegraph Company, its officers, servants and agents, severally and collectively, be perpetually enjoined from the use of its right of way.

The third prayer in this petition is that the plaintiffs, the State and Railway Company, offers to do equity, and pray that the injunction be granted on such terms as may appear to the Court to be just and equitable between the parties with respect to the removal of the Western Union Telegraph Company's property of any and all descriptions and kinds. They say that they concede it ought to have a reasonable time to make the removal; and that is one of the questions that you are to determine; and then there is a prayer for general relief and for process to issue.

The defendant, gentlemen, the Western Union Telegraph Company, filed answers in this case, and they answer *in this case and*



*they answer* the first paragraph by saying that the defendant admits that under and by virtue of an Act of the General Assembly of Georgia entitled 'An act to authorize the construction of a railroad communication from the Tennessee line, near the Tennessee River [fol. 499] to the point on the Southeastern bank of the Chattahoochee River, most eligible for the running of branches roads, thence to Athens, Madison, Milledgeville, Forsythe and Columbus; and to appropriate monies therefor,' approved December 21st, 1836, and the several acts amendatory thereof, the State of Georgia constructed a "railroad communication" known as the Western & Atlantic Railroad extending from the City of Atlanta in the State of Georgia through the Counties of Fulton, Cobb, Bartow, Gordon, Whitfield and Catoosa, in the State of Georgia, and the County of Hamilton in the State of Tennessee, to the City of Chattanooga, Tennessee.

The defendant has filed an original answer in the case and an amendment thereto. After argument on the demurrers filed in this case to the defendant's answer, the Court has marked with a pencil such parts of the answer as have been stricken on demurrer, and opposite those lines you will find the words "Out", and wherever you find those lines and the word 'out' written, you will understand that that part of the answer is not for your consideration in the case,—it has been stricken, and if there was any proper way to do so, without mutilating the record it would be eliminated, but the Court will only read to you such parts as were left in. I see no other way than to direct the careful attention of the jury to these lines which will indicate to you what is left in the answer, and what has been stricken therefrom.

Answering the first paragraph of the petition, defendant admits that under and by virtue of an Act of the General Assembly of Georgia, entitled an "Act to authorize the construction of a railroad communication from the Tennessee line, near the Tennessee river to a point on the Southeastern Bank of the Chattahoochee river, most eligible for the running of branch roads, thence to Athens, Madison, Milledgeville, Forsythe and Columbus; and to appropriate monies therefor, approved December 21, 1836, and the several Acts amendatory thereof, the State of Georgia constructed a 'railroad [fol. 500] communication' known as the Western & Atlantic Railroad extending from the City of Atlanta in the State of Georgia through the counties of Fulton, Cobb, Bartow, Gordon, Whitfield and Catoosa in the State of Georgia, and County of Hamilton in the State of Tennessee, to the City of Chattanooga, Tennessee.

Defendant admits that the said Western & Atlantic Railroad was constructed out of public funds, but for lack of sufficient information can neither admit nor deny that it was constructed solely out of public funds.

The next part of that answer, which you will see marked around with a pencil and the word 'out' opposite to it has been stricken on demurrer, and is not now a part of defendant's answer.

The next part of the answer is, Defendant admits that the State of Georgia is the owner of said Western & Atlantic Railroad and of said easements of rights-of-way necessary therefor.

The next part of the answer is marked with a pencil with the words 'out' opposite which shows that it has been stricken and is not a part of defendant's Answer.

The next part of defendant's answer is,—Except as herein admitted, the allegations of the first paragraph of the petition are denied.

Answering the second paragraph of the petition, the defendant admits that the Nashville, Chattanooga & St. Louis Railway a corporation of the State of Tennessee, pursuant to and under the terms and provisions of an Act of the General Assembly of Georgia, approved November 30th, 1915, and the Acts amendatory thereof, entered into a lease-contract with the State of Georgia under which it become a body politic and corporate under the laws of Georgia, under the name and style of the Western & Atlantic Railroad, herein referred to as the present lessee,—and under said lease contract become the lessee of the said Western & Atlantic Railroad; but this defendant expressly denies that said present lessee under said lease contract, or otherwise, has acquired any right, title of interest [fol. 501] whatsoever in or to the lines of telegraph now owned by the Western Union Telegraph Company, hereinafter more fully described, or in or to the easements and rights in land necessary therefor; and defendant denies that said lines of telegraph and the easements and rights in land necessary therefor are included within, or are covered by said lease-contract. Except as herein admitted, the allegations of the Second Paragraphs of the Petition are denied.

The third paragraph of this original answer is: Defendant admits the allegations of the third paragraph of the petition. Defendant was incorporated in the State of New York in the year 1851, for the purpose of erecting, maintaining and operating lines of telegraph throughout the States and Territories of the United States and into other countries, and of transmitting and carrying over such lines of wire, as a public or common carrier, such messages as should be presented to it for transmission. Defendant, under and by virtue of its said charter and of the laws of New York, was at the times hereinafter mentioned, and now is, authorized to do and perform all of the acts and things for the purposes for which it was incorporated, to erect, maintain and operate lines of telegraph throughout the United States and Territories, and into other countries; to transmit and carry telegrams over such lines as a public or common carrier; to extend its lines of telegraph, to construct branch lines to connect with its main lines, to unite with any other incorporated telegraph company to purchase, lease and acquire such property, rights, franchises and privileges as might be convenient or necessary, and to acquire the property, rights, privileges and franchises of any telegraph company organized under, or created by the Laws of the State of New York, or, of the other State.

A large portion of the next paragraph of the Answer has been stricken on demurrer, and the part so stricken is marked around with a pencil and the word 'out' placed opposite, and is not a part of [fol. 502] defendants answer and will not be so considered by you, and you will pay no attention to any portions so stricken.

The next part of defendants answer left in is: Defendant admits that the Western & Atlantic Railroad was until the 27th day of December, 1870, operated by the State of Georgia in the manner and upon the conditions set forth in the foregoing acts.

The next part of defendants answer left in is,—Defendant admits that, pursuant to an Act of the General Assembly of Georgia, approved October 24th, 1870,—Acts of 1870,—page 423,—the Western & Atlantic Railroad was leased to a corporation known as the Western & Atlantic Railroad Company for a term of twenty years; and it says, that it has not a copy of said lease and requires proof thereof to be made.

The next part of defendants answer is, it admits that pursuant to an Act of the General Assembly of Georgia, Approved November 12th, 1889,—Acts 1889, page 362,—the Western & Atlantic Railroad was, for a term of twenty years beginning December 27th, 1890, leased to the Nashville, Chattanooga & St. Louis Railway, which by virtue of said Act and Lease then become a corporation under the laws of Georgia under the name and style of the Western & Atlantic Railroad Company.

Then the defendant says that it has not a copy of that lease and requires proof thereof.

Defendant answering further says, that except as herein admitted, the allegations of Paragraph 4, are denied.

The fifth paragraph of the original answer says, as to the allegations of Paragraph 5 of the petition, defendant admits that pursuant to an act of the General Assembly of Georgia, approved November 30th, 1915, and the amendments thereto, the Western & Atlantic Railroad was leased for a term of Fifty years beginning December 27th 1919, to the Nashville, Chattanooga & St. Louis Railway which under the provisions of said act and as said lessee became a corporation of the State of Georgia under the name and style of Western [fol. 503] & Atlantic Railroad; and this Defendant requires proof to be made of said lease; and except as herein admitted the allegations of the 5th Paragraph of the petition are denied.

Then answering the allegations of the Sixth paragraph of the petition, this defendant admits that it is maintaining and operating over, upon or along what is known as the right-of-way of the Western & Atlantic Railroad between the City of Atlanta, Georgia, and in the City of Chattanooga, Tennessee, telegraph lines, poles, wires and other appurtenances owned, possessed and employed by it in the conduct of its telegraph business.

Then the defendant further answering says: The said lines of telegraph and said easements and interests in land are situate upon or along the said Western & Atlantic Railroad and its right-of-way, and may be generally described as follows:

You will have this answer out with you, gentlemen. You have heard this description read and you can read it for yourselves and see with more particularity than the Court will give you, but a general description is as follows: One main pole line of telegraph commencing in Fulton County, Georgia, at or near the terminus of the Western & Atlantic Railroad in Atlanta, Georgia, on the Western

or left hand side going north of said right-of-way, and extending thence northwardly, upon and along said westernside of said right-of-way to a point about 1,947 feet north of Mile Post C-133, and then it goes on and describes this whole property and line which this defendant claims it has easement along and over which it claims the right to stay there as against the claims of these plaintiffs, and you will find that description on the 12th and succeeding pages of defendants original answer, to the conclusion of it in the answer. It goes on and describes how these poles are set.

The substance of this description is to describe the right-of-way between Atlanta and Chattanooga involved in this contest and in which this defendant sets up its rights, and denies the right of plaintiff [fol. 504] tiffs or either of them to interfere with it. You have had this description read to you, and you will have the original answer out with you and you can read it for yourselves, and see what it contains, with more particularity than the Court has given you.

The defendant, in reference to the matter says that there have long been, and are now, established and maintained by defendant along said line of telegraph many offices, stations or depots at which messages have long been and now are received by this defendant from the public for transmission and delivery at other points, and at which messages transmitted from other points have been received for delivery and have been delivered by this defendant.

And defendant further says, the above mentioned pole lines of telegraph extending from said main line of telegraph is of substantially the same character and construction as said main line of telegraph.

Defendant further says that the Mile Posts above mentioned are those of the Western & Atlantic Railroad giving the distances from Chattanooga.

The next part of defendant's answer has been stricken and is not to be considered by you.

Then the defendant further answering says, the permits and grants aforesaid from the State of Georgia to the predecessors in title of this defendant, the conveyances from such predecessors in title under which this defendant claims to be possessed of such easements, and the grants and permits from the State of Georgia to this defendant itself, are:—and the description of what they are is not a part of the defendant's answer.

Defendant further answers that on the 10th day of October 1850, Garst & Bean who proposed to organize a corporation and to build a telegraph line from Atlanta to Nashville, which was subsequently made to embrace the Georgia Railroad and to extend to Augusta, made known such proposal of the Chief Engineer of the Western & Atlantic Railroad, and at the same time expressed a desire to procure the aid of the Western & Atlantic Railroad in the construction of a line of telegraph by a corporation to be called the Augusta, Atlanta & Nashville Magnetic Telegraph Company. Thereupon W. L. Mitchell, the Chief Engineer of the Western & Atlantic Railroad, on October 11th, 1850, wrote Garst & Bean a letter, a copy of which is hereto attached as Exhibit 1.

And the balance of that paragraph has been stricken, as you will see by looking at the paper.

Defendant goes on and says, thereafter by an Act of its General Assembly, approved January 27th, 1852, the State of Georgia incorporated the Augusta, Atlanta & Nashville Magnetic Telegraph Company for the purpose of doing the business of a telegraph company from Augusta, Georgia, through Atlanta to the City of Nashville, Tennessee, with the usual powers of corporations, including the power to purchase, hold, sell and convey property. In and by said Act the State of Georgia expressly ratified and affirmed the said contract entered into between the said William L. Mitchell, Chief Engineer of the Western & Atlantic Railroad and G. W. Garst and J. M. Bean, on the part of said Augusta, Atlanta & Nashville Magnetic Telegraph Company, and further expressly enacted in said Act:

"That the Augusta, Atlanta & Nashville Magnetic Telegraph Company, shall have power and authority to set up their fixtures along and across any high road or high roads; and any railroad which now or hereafter may belong to this State and any waters or water courses of this State."

It says, that under and by virtue of said contract and statute, the first line of telegraph upon and along the Western & Atlantic Railroad was constructed, established and operated, and the Augusta, Atlanta & Nashville Magnetic — Company was thereby granted and acquired, perpetual, irrevocable and assignable easements for the construction, maintenance and operation thereof.

[fol. 506] Then the balance of this paragraph is stricken down to Subparagraph 6 where it is alleged by the defendant, that on the first day of September 1858, the said Alvin D. Hammett conveyed to William S. Morris, et al., all of the telegraph lines, properties and easements formerly belonging to the Augusta, Atlanta & Nashville Magnetic Telegraph Company and particularly those situate upon or along the Western & Atlantic Railroad from the City of Atlanta to the dividing line between the States of Georgia and Tennessee, a copy of which is hereto attached marked Exhibit 3.

In sub-paragraph 7, defendant, says that on the 13th day of November 1858, the said George L. Willy conveyed to William S. Morris, et al., all of the telegraph lines, properties and easements formerly belonging to the Augusta, Atlanta & Nashville Magnetic Telegraph Company in the State of Tennessee, extending from the City of Chattanooga upon or along the Western & Atlantic Railroad to the dividing line between the States of Georgia and Tennessee, a copy of which is hereto attached marked Exhibit 4.

Sub-paragraph 8 of the answer charges that on the 28th day of December, 1859, said William S. Morris, et al., conveyed to the American Telegraph Company all of the telegraph lines, properties and easements acquired by them as aforesaid extending from the City of Chattanooga in the State of Tennessee, to Atlanta in the

State of Georgia, copy of which conveyance is hereto attached, marked Exhibit 5.

The next paragraph known as sub-paragraph 9 of the answer is stricken.

Sub-paragraph 10 of the answer is stricken, except the words, "A copy of said contract is hereto attached as Exhibit 7," and then follows as part of the answer:

Defendant alleges that no good ground did in fact exist for rescinding said contract or for instituting any action or proceedings conditionally authorized by said resolution.

Then follows: In further denial of the allegation of the petition, [fol. 507] and particularly paragraph 6 thereof, it denies that defendant's use and occupation of said right-of-way of the Western & Atlantic Railroad is without authority from the State of Georgia and constitutes an unlawful encroachment thereof.

That is to say, gentlemen of the jury, the defendant denies that its use and occupation of said right-of-way of the Western & Atlantic Railroad is without authority from the State of Georgia and constitutes an unlawful encroachment thereon.

This defendant alleges that its said use and occupation is authorized and is lawful not only by reason of the facts hereinabove set forth, but because of and under the following facts.

You will understand, gentlemen, that the substance of this answer, from beginning to end is a denial of its unlawful use or occupation by this line of construction of telegraph, by its wires and appurtenances from Atlanta to Chattanooga. They have made in their denial some statements which the plaintiff says are admissions that they have no rights in it, or that certain things are stated, but the general scheme of this defendant's answer is a denial that it is guilty of any unlawful use or occupation of this telegraph line or any of the appurtenances thereto.

So, as I have stated to you, the defendant denies the allegations of the plaintiff's petition, and particularly Paragraph 6 thereof, that the defendant's use and occupation of said right-of-way was without authority from the State of Georgia and that it constitutes an unlawful encroachment thereon. Defendant alleges that its said use and occupation is authorized and is lawful, not only by reason of the facts it has set forth but because of other facts which they proceed to state.

Then follows sub-paragraph 11 which has been stricken on demurrer. The next part of the answer not stricken is on page 36, and defendant admits, it says, that its use and occupation of said right-of-way, and the possession, maintenance and operation of said lines of telegraph and of said easements necessary and useful therefor, is contrary to the will and consent of the Nashville, Chattanooga [fol. 508] & St. Louis Railway, both as a corporation under the laws



of the State of Tennessee and as lessee of said railway and a corporation of the State of Georgia under the name and style of Western & Atlantic Railroad.

Defendant then answers further, that any interference with, and any removal of, said lines of telegraph from the right of way of the Western & Atlantic Railroad, and any Georgia statute law, judgment or decree so requiring, will deprive defendant of its lawful rights and properties vested in, secured to it, by the laws and constitutions of Georgia and of the United States, and will be unjust and inequitable to defendant, not only under and because of the facts above alleged, but also under and because of the following facts.

The balance of that paragraph is stricken down to the 7th paragraph and defendant says, answering the allegations of the 7th paragraph of the petition defendant denies that the plaintiff is this cause, or any of them, have any right, title or interest in or to, or own or are entitled to the possession of the said lines of telegraph and the easements necessary therefor hereinbefore described. Defendant alleges on the contrary that it has exclusive right and title thereto and possession thereof. Defendant denies that its said possession, use and occupation of said lines of telegraph and easement are without warrant in law, and denies that its possession and use thereof is a continuing trespass and a constantly recurring grievance to the plaintiffs, or any of them.

In paragraph 8, defendant admits that the General Assembly of the State of Georgia passed an Act entitled "An Act to provide for the leasing or other disposition of the Western & Atlantic Railroad and its properties; for the erection of a commission to effectuate such purpose and to define its powers and duties; making an appropriation for the cost of the work required, and for other purposes," which was approved November 30th, 1915.

This answer is substantially as I have read it and this part of it [fol. 509] has been read to the jury and you will also have it out with you and you can see for yourselves what it says, but that is a concession that that State appointed a commission on this subject, the lease of the Western & Atlantic Railroad. It is a concession or admission that if any property is owned by the Western & Atlantic Railroad not useful for railroad purposes that it could be properly and advantageously disposed of separately from the lease of the road. That is a contention of defendant. The Commission established by said Act further directed the Commission to ascertain, it is contended, what if any steps should be taken to assert the right and title of the State to any part of the right-of-way or property of the road that may be adversely used and occupied and required the Commission to cause to be prepared a complete and accurate survey, and the extent and character of every use or occupation of the right-of-way and other properties of the road by any person or corporation not used or apparently not useful for railroad purposes and such Commission is instructed to prepare bills for presentation to the General Assembly to carry into effect any recommendation which the Commission might make with respect to what steps should be taken to assert the rights of the State, and it admits that the General Assembly



of Georgia amended the last mentioned Act by the adoption of an Act entitled "An Act to amend an Act approved November 30th, 1915, providing for the leasing or other disposition of the Western & Atlantic Railroad and its properties."

It says that the amendment last mentioned contained language purporting to give the Commission, created by said Act of November 30th, 1915, full power and authority in its discretion to deal with, and dispose of any and all encroachments upon and use and occupation of any part of the right-of-way and properties of the Western & Atlantic Railroad by any person other than the lessee under said Act, its tenants and licenses, whether such encroachments, use or occupancy be permissive or adverse, and whether with or without claim of right therefor; to determine whether such encroachments, use and occupation, or any of them, shall be removed [fol. 510] and discontinued, or whether they or any of them shall be permitted to remain, and if so, to what extent and upon what terms and conditions, with further authority to adjust, settle and finally dispose of any and all controversies that may arise.

Defendant admits that the present lease contract contains in it a reservation of a claimed right to remove or cause to be removed obstructions to the land.

It is the contention of the defendant that nothing in this Act referred to give permission or confers upon the plaintiff in this case or either of them the right to interfere with what it asserts to be its right of occupation of the Western & Atlantic Railroad for telegraphic purposes from the city of Atlanta, Ga., to Chattanooga, Tenn., or gives them the right to bring suit.

Then attached here is Exhibit No. 2, which purports to be a memorandum of an agreement made and entered into this 12th day of August, 1858, in the City of Lynchburg, Va., between Alvin D. Hammett of Marietta, Ga., party of the first part—you will have that Exhibit out with you and will find it for yourselves and see with more particularity than the Court has given you, exactly what is set forth in it, and attached to that is another contract.

Another Exhibit No. 1, is attached to this original answer, which the defendant sets out as a part of its answer which is a communication from W. L. Mitchell, Chief Engineer, dated October 11th, 1850, and addressed to Garst & Bean, and you can read it for yourselves. It is alleged to be a proposition by the Western & Atlantic Railroad to furnish poles for the telegraph lines from Atlanta to Chattanooga, and to grant the use of the right of way.

This Exhibit No. 2, which I have already referred to and you have heard read is alleged to be a contract between Hammett of Marietta and Morris, Crenshaw and Langhorne of Lynchburg, Va. It is a proposition to sell this telegraph line.

Exhibit 3, is attached to the answer and you have heard it. It purports to be a contract between A. B. Hammett of Cherokee County, Ga., and William S. Morris, John S. Langhorne and Robert W. Crenshaw, of Lynchburg, Va.

Exhibit No. 4 attached to defendant's answer purports to be a

contract, signed Geo. L. Willy, with William S. Morris, John S. Langhorne and Robert W. Crenshaw, of Lynchburg, Va.

Exhibit No. 5 purports to be a deed from Morris, Langhorne and Crenshaw, conveying property to the American Telegraph Company and about certain stock in this Company, and you have heard that Exhibit read and you will have it out with you.

Exhibit No. 6 purports to be an agreement the 12th day of June, 1886, between the American Telegraph Company, a corporation under the laws of New Jersey, and the Western Union Telegraph Company, a corporation under the laws of New York. You have heard that contract read before and you will have it out with you and can read it for yourselves.

Exhibit No. 7 is Articles of Agreement made and entered into by and between the Western Union Telegraph Company of the one part and the Western & Atlantic Railroad Company, a corporation, and you have heard that contract read and will have it out with you.

Exhibit No. 8 is a receipt purported to be signed by Western Union Telegraph Company, by William Orton, President, in which he professes to have received \$4,000.00 from the Western & Atlantic Railroad Company in settlement of litigation between the Western Union Telegraph Company and the Western & Atlantic Railroad Company and you have heard that paper read and you will have it out with you and you can examine it and read it for yourselves.

The next Exhibit, No. 9, is a resolution by the Western & Atlantic Railroad Company, certified to by the Secretary, W. C. Morrill, reciting that upon the Western Union Telegraph Company signing the receipt prepared by our attorney that the Treasurer of this Company pay over to the Telegraph Company the sum of \$4,000.00 and related to the other paper to which I have just called your attention.

Exhibit No. 10 is copy of an Act of the General Assembly of the State of Tennessee, Act of 1839, and that Act has been put in evidence in the case and read to you.

The next Exhibit No. 11, is an Act of the Legislature of Tennessee, Chapter 195, of the Acts of 1847. You have heard that read and it has been put in evidence before you.

Exhibit No. 12, copies of Sections of the Code of Tennessee relate to adverse possession and you have heard those read.

The next is Exhibit 13, being a resolution of the Western Union Telegraph Company at a meeting of the Board of Directors, at the Executive Office, 145 Broadway, New York; this resolution accepting the provisions of the Act of Congress relating to telegraph companies.

The next is Exhibit 14 and recites that Whereas the Nashville, Chattanooga & St. Louis Railway lessee of the Western & Atlantic Railroad under lease of December 27th, 1919, has represented to this Commission that the Western Union Telegraph Company is adversely using and occupying the right of way, and giving authority to Mr. Wimbish to bring this suit. That is the original answer of the defendant.

Gentlemen of the Jury, after the filing of that original petition in the case, as they had the right to do, the defendants filed an amended answer, and it is necessary for me to go over with you.

Paragraph 12 of this amendment admits that the Western & Atlantic Railroad is a railway communication extending from the City of Atlanta, in the State of Georgia, through the Counties of Fulton, Cobb, Bartow, Gordon, Whitfield and Catoosa, and the county of Hamilton in the State — Tennessee, to the city of Chattanooga, Tennessee. Except as herein admitted each and every allegation of paragraph 1, of the petition in this cause is denied.

The allegations of the 4th paragraph of the petition and each [fol. 513] of them are denied.

Answering the 6th paragraph of the petition defendant admits that it is maintaining and operating along the Western & Atlantic Railroad between the City of Atlanta and the City of Chattanooga telegraph lines, poles, wires and other appurtenances employed by it in the conduct of its telegraph business. It denies that the land and easements occupied, or taken for the construction, maintenance, operation and use of its telegraph lines, poles, wires and other appurtenances employed by the defendant in the conduct of its telegraph business is on the right of way or the property of the Western & Atlantic Railroad, or of the complainants in this cause, or either of them. Except as herein denied, this defendant for want of sufficient information says that it can neither admit or deny what title, ownership or interest the complainants or either of them have in the land upon over or through which the said Western & Atlantic Railroad is constructed or the property denominated in the petition as right of way of the Western & Atlantic Railroad and requires strict proof.

Defendant denies that its said use and occupation of the land, easements and rights taken and used by it for the construction, maintenance and operation of its telegraph lines, poles, wires and other appurtenances employed by it in the conduct of its telegraph business is without authority from the State of Georgia. That is, defendant denies that any of these rights it is exercising is without authority from the State.

Defendant admits that its use and occupation of the land, easements and rights taken, used and occupied by it for the construction, maintenance and operation of its telegraph lines, poles, wires and other appurtenances employed by it is contrary to the will and consent of the Nashville, Chattanooga & St. Louis Railway as lessee of the Western & Atlantic Railroad.

Defendant denies that its use and occupation of the land, easements and rights taken, used and occupied by it for its telegraph [fol. 514] lines, poles, wires and other appurtenances employed by it is the conduct of its telegraph business is an unlawful encroachment upon said right of way, but admits that its taking, use and occupation of the land, easements and interest are adverse uses thereof.

Defendant amends sub-division 3 of paragraph 6 of its original answer by substituting for the second paragraph in said sub-division which begins on page 20 of said answer with the words, "Threupon

W. L. Mitchell" and ending on page 21 with the words, "Instructions for carrying out of the contract so made" the following:

Thereupon W. L. Mitchell, the Chief Engineer of the Western & Atlantic Railroad on October 11th, 1850, wrote Garst & Bean a letter, copy of which is hereto attached as Exhibit 1.

It says that said proposition and offer were accepted by Garst & Bean on October 11th, 1850, and thereupon the Chief Engineer of the Western & Atlantic Railroad issued an order that so soon as the telegraph company should be sufficiently organized to warrant the undertaking, the resident engineer and road master would make all necessary arrangements for the carrying out of the contract made by said offer and its acceptance, and thereafter telegraph posts were erected and the work progressed and the line was constructed and established. Hereto attached as Exhibit 1, which is in lieu of Exhibit 1 attached to the original answer is an extract from the report of William L. Mitchell, as Chief Engineer of the Western & Atlantic Railroad to his Excellency, George W. Townes, Governor of Georgia, dated September 30th, 1851, in which is set forth the said proposal by Garst & Bean, the said letter of October 11th, 1850, to them from William L. Mitchell, Chief Engineer of the Western & Atlantic Railroad; the acceptance by Garst & Bean, October 11th, 1850, of the offer contained in said letter and the report of said Chief Engineer of his order thereupon given and his statement and report of the [fol. 515] progressive construction of said lines of Telegraph. Leave of reference is prayed to said exhibit.

Defendant alleges that thereafter in a suit brought by Camp & Hammett against the Augusta, Atlanta & Nashville Magnetic Telegraph Company in the Superior Court of Cobb County, a judgment or decree was rendered, under which all of the properties of the Augusta, Atlanta & Nashville Magnetic Telegraph Company, including its telegraph lines and rights of way along the Western & Atlantic Railroad were sold. That all the records of Cobb Superior Court were destroyed during the Civil War sometime between the year 1860 and 1866, for which reason the original pleadings and judgment in said suit and copies thereof, which were *among* the papers destroyed, cannot now be obtained. For like reason the report of such sale cannot now be procured.

Because of the loss of original papers and the destruction of County Records during the Civil War during the years 1861 and 1865 and the long lapse of time since that date defendant is unable to attach copies of conveyances of said properties to A. D. Hammett, or to George L. Willy except those hereto attached as exhibits.

Defendant amends sub-division 5 of Paragraph 6 of its original answer by substituting—which substitution was excluded and ruled out.

You will have this amended answer out with you and my recollection is you have already had these papers attached read to you, but you will find them as exhibits to this amended answer and you can read them for yourselves and see with more particularity than the Court will give you, exactly what they are.

Exhibit 1 is that on the 10th day of October, 1850, Garst & Bean

proposed to organize a company of stockholders and to build for them the telegraph line from Atlanta to Nashville, which was subsequently made to embrace the Georgia Railroad, and to extend to Augusta and expressing a desire at the same time to secure the aid and countenance of the Western & Atlantic Railroad to the State of Georgia. The [fol. 516] Company was called the Augusta, Atlanta & Nashville Magnetic Telegraph Company. Mr. Garst retired and Mr. Bean prosecuted the enterprise along. The following correspondence of the Chief Engineer of the Western & Atlantic Railroad—that a letter by W. L. Mitchell, says in substance that he had — the matter much reflection and had a free conversation with His Excellency Governor Townes upon the subject and that they were fully satisfied from the nature of the telegraph and the experience of other roads that there was no appendage more valuable to the efficient management of a railroad. Then he proceeds to say that he has come to the conclusion to submit the proposition,—to furnish and erect posts from Atlanta to Chattanooga, describing them and how they were to be placed, and to grant the use of the right of way to the Telegraph Company and to pass the officials and material along the road free of charge. For the consideration of the foregoing the Western & Atlantic Railroad is to receive the sum of \$5,000.00 to be placed to its credit upon the books of the Telegraph Company, and instead of interest on that sum is to receive dividends as they may be declared. For the further consideration of the foregoing services and grants all the telegraph offices between Atlanta and Nashville, erected by the company shall be subject to the use of the road free of charge.

Appended to that letter is a statement "We hereby accept the proposition, submitted in yours of this date," and signed Garst and Bean.

The next paper seems to be a statement by Mitchell, Chief Engineer, alleged to be his statement, in which he says that he passed an order that so soon as the telegraph company is sufficiently organized to warrant the undertaking the resident engineer and road master will make all necessary arrangements for carrying out our part of the contract; but we did not commence planting posts until last May, and from a desire to economize as much as possible, and do the work with our repairing parties so as not to interrupt their regular duties, the work has progressed slowly.

Gentlemen, you will have that paper out with you and you can read it for yourselves, you have already heard it read. It says that posts have been delivered and half or more planted and telegraph offices have been established at Atlanta, Marietta, Cartersville and Kingston and a branch line from Kingston to Rome.

The next Exhibit set out in this amendment is No. 15.

Mr. Peeples: All the balance of the exhibits, if Your Honor please have been stricken, including that one, and of course evidence of them ruled out.

The Court: I don't think it is necessary for me to go further and explain exhibits that were ruled out.

Mr. Peeples: I want to ask your Honor to charge that exhibits to

the original answer and to the amendment which were ruled out should not be considered by the jury.

Mr. Clay: I understand the Court is now simply stating to the jury what the pleadings are, and explaining what is included in the pleadings.

Mrs. Peeples: They are in the pleadings but have been stricken from the pleadings.

The Court: All stricken portions of the pleadings, which includes exhibits, that have been stricken, of course, are ruled out and should not be considered by the jury.

The Court: Gentlemen of the jury, these pleadings are very voluminous. You have heard them read as far as the Court has decided that they were proper. That is to say, all that were not stricken were read, and without more, it would perhaps be well for me to explain to you what seems to the Court to be the controversy and, of course, you must determine what the proof about it is.

One of the plaintiffs in this proceeding and one of the real and necessary parties is the State of Georgia. The State of Georgia [fol. 518] claims that it is the owner in its sovereign capacity of a railroad. You have heard the name, the Georgia Railroad. That is the road which leads from Atlanta to Augusta. That is a private corporation; at least its name, "Georgia," does not indicate that the State has any interest in it.

But the State of Georgia did, it claims out of its public money, its taxes and revenues paid by the people for governmental purposes—paid to it in its sovereign capacity, that it did build a railroad from the city of Atlanta, in Fulton County, Georgia to the City of Chattanooga, in Hamilton County, Tennessee.

The State claims that it built it out — public money and that it has always owned it and operated it as government or State property except when it chose to let somebody else have it and that these people that did get it, in whatever capacity they took it whether as private lessees, or railroad lessees, they all took it subordinate to all the rights of the State. They could not acquire anything in it, except what the State, through its proper officials and proper departments of government chose to give.

The State of Georgia claims that in this case it never did grant to the Western Union Telegraph Company any right of occupation of its right of way.

It says whatever occupancy that they had there has been permissive, or without lawful authority. The State claims that no prescriptions can run against it and that is true.

If you were to have a deed to another man's land and come and settled down on it and stayed there for seven years in notorious and adverse possession and all that you might acquire title to it, but you might go and squat down on this old depot here in the City of Atlanta, which is conceded to belong to the State, for 50 years, and you would not get any title to it. Prescriptions do not run against the State.

Then, there is another way in which defense claims they might acquire title, acquire a right by silence. For instance, if you saw



[fol. 519] another may sell your horse, you saw him represent to a purchaser that it was his horse, you saw the purchaser pay for it and stood by and said nothing, the horse would be gone as far as you were concerned. You would be estop-ed from denying it was your horse because the time for you to as-ert your title to the horse was when you saw it being sold. That sort of doctrine does not apply to the State either. The mere fact that the State knew about somebody occupying some of the land, that it had a right to claim, and that it did not assert its claim to it would not estop the State from asserting its title. Whenever the State got ready to exercise its right, it would have the right to do so. This doctrine came down to us from ancient days and used to be known in the law as *nullus tempus occurrit regi*, that is, time would not run against the king. We have no king but we have our government, and our immediate government is the State and the State ought to have and does have some privileges that an individual could not have.

That is what the State comes in here and sets up; it says it had the right of way to a railroad, that it built a railroad, that it took charge of a railroad—built it on its right of way, and it says that it has a right to have people that have no right on it to get off, and that it has notified this claimant, the Western Union Telegraph Company, to get off of its right of way.

Now, the Nashville, Chattanooga & St. Louis Railway is conceded to be the lessee of the State. It is the renter from the State. It has rented from the State, it claims, all the property, rights and privileges which the State had, and it contends that there were some rights that that State did have that it has been deprived of by this Company. It says that it rented this property subject to the right of the State to assert its rights and with the implied promise on the part of the State to assert its rights; and it says that it has the right to the use of this right of way, exclusive right to it, and it says that it is looking to the State to give it this right, that the State ought to give it this right.

[fol. 520] Now, it is left to the Court and jury to determine whether the State has any rights in it or not. If the State has a right to move this defendant off its right of way, then the Nashville, Chattanooga & St. Louis Railway has the right to have it done, and if the State has not got a right to move it off, the Nashville, Chattanooga & St. Louis Railway has no right to have it done, no matter what inconvenience it proves to it.

Now, the burden of proof is on the State in this case to show that it owns the Western & Atlantic Railroad, that it has the Western & Atlantic Railroad. The burden of proof is on the State to show that it had the right of way to it; and the burden of proof is on the State to show that this defendant is on its right of way.

If the State shows that it had a railroad, and if the State shows that it has a right of way; and if the State shows that these people are on its right of way without its authority, then the State has a right to have them moved off, and the State must carry that burden by preponderance of evidence in the case.



If you do not believe that the State has shown that it owns the railroad, and owns the right of way, and that these people are on it, why, that would necessarily cause you to find a verdict for the defendant.

If you believe that the State does own the railroad, that the State does own the right-of-way, and that this defendant is on it without authority from the State, then the State ought to gain the case and the defendant ought to be put off.

Now, the burden is on the defendant, when it comes in and says I am there and there rightfully; then the burden is on the defendant to show how it is there, and how it is there rightfully.

Wherever this burden of proof rests in the case, and when the Court tells you it must be carried by a preponderance of evidence, then that necessarily brings to your mind the fact that you must weigh the evidence; and preponderance of evidence, the greater weight of the evidence,—what does that mean?

[fol. 521] The law suggests some rules for you to go by; and preponderance of evidence means that superior weight of the evidence, which, though not necessarily sufficient to remove a reasonable doubt must be strong enough to incline an impartial mind to one side of the issue rather than the other.

Hence, as I have told you, the law does not require mathematical certainty to determine the issue in a certain case, or in any case, but reasonable and moral certainty is all that is required.

Now, under the rules given you by which to weigh evidence, you must look to all the facts and circumstances of the case as they are presented to you by the evidence, all the evidence. You look to the documentary evidence in the case. Documentary evidence is matters of contracts and letters, or anything written about the case that *have* been put in evidence. Look at all these things that have been put in evidence and when a book or paper is sent out, and is before you, you are only to consider that part of it which the judge has put his approval upon as proper. I mean by that, just to use a simple illustration—suppose I hand you out this book here, and I cite the page 502, paragraph 6001, as a case for you to consider, and that is all you consider; it would not be proper for you to take the whole book and say, “We will read some other Chapters in it to see what the law says about some other things, about something else—that would not be proper for you to do and you would not do that. You have enough to do to read and consider that part that is in, and so you will not consider that part which is not in and which the Court has rejected.

When you come to consider the testimony of the witnesses you have the right to look at their manner and deportment on the stand in so far as it may legitimately appear to you, whether they are credible, [fol. 522] or sensible or impartial: look to the intelligence of the witness, and the whole situation, as the evidence has made it appear to you, and then give any evidence, and all the evidence before you, such credit as you think, under the rules given you, it is entitled to receive and should receive.

In other words, to express it in another way, you have the right to

look to the manner and deportment of the witnesses as they have been examined on the stand in your presence. You have the right to consider whether a witness is a party or not a party to the case; the relationship of witnesses to the parties and to the case; and this expression relation and ownership, would apply to business relations as well as blood relations. Another thing you have a right to consider and judge of in weighing testimony is whether a witness is interested or not interested in the case or its results. You have the right to judge of the credibility of the witnesses in so far as it may legitimately appear from the trial. You have the right to judge of the opportunity of witnesses for knowing the truth of the testimony given in the case. The law even goes so far as to allow the jury to judge of the probability of the truth of evidence given by witnesses; and you may consider the number of witnesses, but the preponderance of evidence is not necessarily with the greater number of witnesses. That is a matter for the jury, and if there is conflicting evidence in the case, the jury should reconcile it, if it can be reconciled, so as to make all the witnesses speak the truth and *perjury* be imputed to none, but in determining the issues in the case you have got to decide where the preponderance of evidence is, where the weight of it is, the greater weight.

Consider all the evidence, as I stated to you, about the various kinds of evidence, documentary evidence, circumstantial evidence, direct evidence and other kinds, and I mentioned to you about what is known as admissions. It is competent to go in evidence admissions of the adverse party to a litigation made against his interest. That is for the jury to determine, and the rule about admissions is that they [fol. 523] are to be scanned with care. Of course what is admitted by the adversary in litigation, as an ordinary thing, it is not necessary to prove. Where the admissions of a party if there are any admissions put in evidence against him it is the duty of the jury to consider those admissions scanning them with care. You may take them in connection with other evidence in the case or you may disregard them entirely.

The defendant would have the right to explain what he meant about admissions or at least what he had said but his admissions are there to be considered by the jury and for you to determine to what extent it will influence your impartial judgment in giving credit to his admissions or to his testimony, and in weighing all the testimony in the case.

In passing on the questions at issue in the case, of course, as I have said to you before, and it is so important that I repeat it, that you consider such evidence, and only such evidence as the court has permitted to be introduced as evidence in the case.

It has been claimed in this case that this defendant not only made admissions against his interest, admissions favorable to the plaintiff in this case, but that he has done it in other cases; and the rule is, where admissions have been put in evidence that were made in other cases—other pleadings—if they are pertinent to the questions at issue in this case, in the case on trial, bearing directly on it, that is

allowed in evidence for the consideration of the jury in trying to find where the preponderance is.

Of course, time and place and circumstances, under which admissions are made, must be considered, and if the defendant has made admissions the jury can consider them under the rules I have given you.

If a plaintiff puts in an admission by a defendant, or defendant put in an admission by the plaintiff, and those admissions are made in the pleadings in the case, as illustrative, if the plaintiff puts in an [fol. 524] admission that the defendant made in its answer, then that becomes testimony, even though the answer was stricken. It is to be considered by the jury as evidence in the case, and all the answer that the defendant made explanatory of such admission would be allowed to go to the jury to be considered along with the admissions that he was alleged to have made, as explanatory of it, so that the jury could see exactly what the man meant to admit and what he did admit, but the simple fact that an admission was put in would not entitle a defendant to put in his whole answer as evidence in the case simply by reason of the plaintiff having put in a part of his answer as an admission. That is to say, whatever a man says in his own behalf would not be admissible for him, but what he says against his interest can be put in as evidence against him.

Now, I have stated to you about this law of prescription; that possession of land constituting a part of the right-of-way of the Western & Atlantic Railroad, no matter how long it continued, or what good faith or claim of right it gave, would never ripen into a title against the State; the law of prescription would not apply to the State.

There is another rule that governs a case like this—that no officer of the State would have the right to bind it in a case in which he was not directly authorized to act. That is to say, suppose the Western & Atlantic Railroad was run by the State—the president of it, if the State chose to appoint a president or superintendent, would not have the right to dispose of any of the property, or any rights or privileges of it, unless he had the authority of the State to do it. Those things must be done in regular order and in a legal way. If every man in the legislature—in the House and Senate—were to sign a bill declaring a thing to be the law, that would not have the effect of law unless it was done up here at the Capitol in regular session and the Governor of Georgia would not have the right to dispose of any of the State's property unless he was authorized by law to do it. Hence, if you should believe that any officer of the State disposed of the property of the State without authority of law, you would disregard his disposition of it, it would not bind the State.

The State, however, in its wisdom, by legislative enactment could ratify or confirm something that was done even without authority; the State could by proper legislative enactment ratify it, but it would have to be a distinct ratification.

Another thing which has been called to your attention during the progress of the case is that the best evidence pertaining to a case ought to be produced. That is to say, if a man had title to property by

deed and he was having a controversy with his neighbor about whose property it was he ought to produce his deed to it, and if he had lost his deed, then he might establish a copy of it, or get a certified copy of it from the record, if of record.

There is another thing that may be considered, if a man or litigant has in his possession evidence that he did not produce that would apparently hurt him, the jury may consider that in estimating the weight of evidence and the situation in respect to it, and will decide how much weight *out* to be attached to it.

It don't necessarily follow that a man should produce every witness that he could find; nor does it necessarily follow that because a man apparently had evidence that he did not produce that was better than what he did produce it would necessarily follow that the jury would have to find against him.

The general rule is, where a party has evidence in his power and within his reach by which he may repel a claim or charge against him, and omits to produce it, or having more certain and satisfactory evidence in his power, relies on that which is of a weaker and inferior nature a presumption arises that the charge or claim is well [fol. 526] founded; and yet, as I have instructed you, in considering that sort of law, it don't necessarily follow that because a man did not produce evidence which appeared to better that what he did produce, the presumption would necessarily follow that he ought to lose his case or the jury ought to find against him.

You gentlemen are to determine, of course, in this case whether the State of Georgia owns this railroad or not, and you are to determine if it has a right-of-way and if so you are to determine what the right of way is. The burden of proof is on the State to show it. That don't mean that it is necessarily the duty of the Western & Atlantic Railroad to produce written title to every foot of its right-of-way, or exact measurements and all that. You are to look to all the evidence in this case and say whether the State of Georgia has that railroad, and then you are to look to all the evidence in the case, both that which is positive and that which is direct and indirect, or circumstantial, and that which is documentary and then what they claim as admissions and then say did it have a right-of-way and if so then determine whether this defendant is on it, and if so whether it is then on it by right or without right.

Of course, if the Western Union Telegraph Company has got its wires and appurtenances on part of the line, or roads that the Western & Atlantic Railroad has no right-of-way over then the State could not recover that because they would not have a right to it themselves and no lessee of the State could ever get any right the State could not get.

So you are to look to all this evidence and determine under all the evidence in the case whether this road belongs to the State, whether this road has got a right-of-way; then whether this Western Union Telegraph Company is on it and whether they are on it by consent of the State or by any contract that the State might make through itself or properly constituted agents—that is for you to determine.

Gentlemen, I have been requested by counsel, on both sides, to [fol. 527] submit some questions of fact for you to answer, I want you to listen carefully now because all the law of the case has been for the Court to determine, all pleadings in the case have been for the Court to settle; all the admissibility or inadmissibility of testimony is for the Court to settle, and the Court has given you the law to the best of his skill and knowledge, and now it is down to you to find some facts in this case.

I have been asked by the plaintiff in the case to submit certain questions for you to answer, and I have also been asked by the defendant to submit such questions.

The Court is not submitting them exactly as they have been requested and contended for by either party, but the Court is submitting you facts for your determination and upon your finding, on which a judgment and decree can be made in this case.

Question No. 1. Is the State of Georgia the sole and exclusive owner of the right of way of the Western & Atlantic Railroad extending from the City of Atlanta, in the State of Georgia, to the city of Chattanooga, in the State of Tennessee, in its sovereign or governmental capacity? I will submit this paper to you and there is a blank space therein which you may write your answer and your answer will be that it is, or that it is not. And, if you do not believe that the State of Georgia owns it in its sovereign capacity you will say that, but under the evidence in this case the Court is of the opinion that you cannot find anything else but to answer in the affirmative, that question. That is to say that the State of Georgia does own its right of way. But, if you believe under the evidence, that there is some part of it that the State don't own, it would be your duty to so state?

Question No. 2. Is the Nashville, Chattanooga & St. Louis Railway the lessee from the State of Georgia of said Western & Atlantic Railroad and its right of way, operating said road under the corporate name of the Western & Atlantic Railroad, under lease to the [fol. 528] Nashville, Chattanooga & St. Louis Railway from the State of Georgia, under contract of lease dated May 11th, 1917, under the Act of the General Assembly of Georgia approved November 30th, 1915, and the amendments thereto.

There is no question about your answer to that. The evidence in the case would demand, in the opinion of the Court that you answer that in the affirmative, that the Nashville, Chattanooga & St. Louis Railway is the lessee.

Question No. 3. Is the defendant, the Western Union Telegraph Company maintaining an- operating over and along the right of way of the Western & Atlantic Railroad, between Atlanta, Georgia, and Chattanooga, Tennessee, telegraph lines, poles, wires and other appurtenances employed in the conduct of its business?

You will answer that "yes" or "no." Look to the evidence and see what is demanded and on which side the preponderance of evidence is.

Question No. 4. Is such maintenance and operation and occupa-

tion by the Western Union Telegraph Company of said right of way substantially as described in paragraph 6 of the original answer of the Western Union Telegraph Company, in this cause, beginning with the words: "The said lines of telegraph and said easements and interests in lands, are situate," and extending through the words: "Thence northwesterly upon or along the Western or left hand side going north of said right of way to a point about 1,819 feet north of mile post C-7, except—That is, as I understand it to be the description of the right of way by the defendant itself as to where it occupies this right of way.

Question No. 5. Is said use and occupation without authority from the State of Georgia, contrary to the will and consent of the Nashville, Chattanooga & St. Louis Railway as lessee of the Western & Atlantic Railroad, constituting an unlawful encroachment on said right of way, and an adverse use thereof.

[fol. 529] Question No. 6. Is this suit instituted and prosecuted in the name of the State of Georgia, and in its behalf, under the Act of the General Assembly of the State of Georgia, of November 30, 1915, and amendments thereof, and the provisions of said contract of lease on May 11th, 1917, by virtue of authority and direction of the Western & Atlantic Railroad Commission, and joined in by the Nashville, Chattanooga & St. Louis Railway as such lessee.

It is not denied that this case is prosecuted under that situation. The Court directs that you answer that in the affirmative.

Question No. 7. If you find that the Western Union Telegraph Company, is occupying the right of way of the Western & Atlantic Railroad Company, then answer whether or not it is occupying such right of way without the authority of the State of Georgia and without the consent of its lessee, the Nashville, Chattanooga & St. Louis Railway as such lessee.

Question No. 8. If you find for the plaintiff in this case and that it is entitled to have the defendant remove its property off the right of way of the Western & Atlantic Railroad that is to say, its wires, poles, structures and appurtenances, then say what would be a reasonable time to allow the defendant to make such removal.

Gentlemen, you will take that as a basis for your verdict and return answers to those questions, as your verdict.

Perhaps in this long charge I have omitted to say this. While the State claims that it, was the owner in its sovereign capacity of this railroad and of its right of way, and while the State claims that it has never transferred to this defendant any right to remain there, and the State claims that it ought to be put off, the defendant in the case, and I think I have stated it but will state it again, contends that it is there rightfully; it contends that it was there by right [fol. 530] originally, and it contends that it has had successive rights from various people and parties to stay there, and the Court has held unless these rights claimed were coupled up, so as to show that this right of occupation and use by the Western Union Telegraph Company has come down through legitimate chains, and shown to the Court and jury, that there could be no maintenance



of the rights by the reason of setting up things that occurred with other people, unless as stated it is coupled up as a continuous chain.

Take the case, gentlemen, and make your verdict.

The foregoing charge is approved as correct and ordered filed as a part of the record in this case.

This July 4th, 1922.

W. D. Ellis, Judge S. C. A. C.

[File endorsement omitted.]

[fol. 531]

# IN FULTON SUPERIOR COURT

## QUESTIONS FOR THE JURY TO ANSWER AS A SPECIAL VERDICT ON THE FACTS AND ANSWERS

Question No. 1. Is the State of Georgia the sole and exclusive owner of the right of way of the Western & Atlantic R. R. extending from the City of Atlanta, in the State of Ga., to the City of Chattanooga, in the State of Tenn., in its sovereign or governmental capacity.

Answer to question No. 1. It is.

Question No. 2. Is the Nashville, Chattanooga & St. Louis Ry., the lessee from the State of Ga., of said W. & A. R. R. and its right of way, operating said railroad under the corporate name of the W. & A. R. R., under lease to the M. C. & St. L. Ry., from the State of Ga., under contract of lease dated of May 11th, 1917, under the Act of the General Assembly of Ga., approved November 30th, 1915, and the amendments thereto?

Answer to question No. 2. It is.

Question No. 3. Is the defendant the Western Union Tel. Co., maintaining and operating over and upon and along the right of way, of the W. & A. R. R. between Atlanta, Ga., and Chattanooga, Tenn., telegraph lines, poles, wires and other appurtenances employed in the conduct of its business?

Answer to question No. 3. Yes.

Question No. 4. Is such maintenance and operation and occupation by the W. U. Tel. Co., of said right of way, substantially as described in Paragraph 6 of the original answer of the W. U. Tel. Co., in this cause, beginning with the words: "The said line of telegraph and said easements and interests in lands are situate", and extending through the words: "Thence northwesterly upon or along the western or left hand side going north of said right of way to a point 1,819 feet north of Mile Post C-7 except that said use and occupation of said right of way begins at a point on the west side of main track of the Railroad looking northwardly at or about 3,385 feet north of [fol. 532] Mile Post C-136, the wires thence crossing to the east side of said track and continuing on said right of way, on said east side, to a point at or about 4,251 feet north of mile post C-136, the said



telegraph line then leaving said right of way and not appearing thereon again until it crosses said right of way from the east side to the west side of said main track at a point at about 1,037 feet north of mile post C-135, thence extending northwardly upon the said right of way west of said main track to a point at or about 1,947 feet north of mile post C-133, thence as set forth in said paragraph of the answer, down to a point about 1,819 feet north of Mile Post C-7.

Answer to question No. 4. Yes.

Question No. 5. Is said use and accupation, without authority from the State of Georgia, contrary to the will and consent of the N. C. & St. L. Ry., as lessee of the W. & A. R. R., constituting an unlawful encroachment on said right of way and an adverse use thereof?

Answer to question No. 5. Yes.

Question No. 6. Is this suit instituted and prosecuted in the name of the State of Ga., and in its behalf under the Act of the General Assembly of the State of Ga., of November 30th, 1915, and amendments thereof and the provisions of said contract of lease of May 11th, 1917, by virtue of authority and direction of the W. & A. R. R. Commission, and joined in by the N. C. & St. L. Ry., as such lessee?

Answer to question No. 6. Yes.

Question No. 7. If you find that the W. U. Tel. Co., is occupying the right of way of the W. & A. R. R. then answer whether or not it is occupying such right of way without the authority of the State of Ga., and without consent of its lessee, the N. C. & St. L. Ry., as such lessee.

Answer to question No. 7. Yes.

[fol. 533] Question No. 8. If you find for the plaintiff in this case, and that it is entitled to have the defendant remove its property off the right of way of the W. & A. R. R. that is to say, its wires, poles, structures and appurtenances, then say what would be a reasonable time to allow the defendant to make such removal.

Answer to question No. 8. Twelve (12) months from date.

We the Jury find for the Plaintiff.

June 5th, 1922.

J. J. Simmons, Foreman.

[fol. 534]

FULTON SUPERIOR COURT

[Title omitted]

Verdict for Plaintiffs June 5, 1922

DECREE—Filed June 14, 1922

The jury in the above cause having rendered its verdict therein on June 5th, 1922, finding in favor of the plaintiffs, and returning as part of said verdict its response to questions submitted to it by the Court:

It is considered, adjudged and decreed that the said verdict be and it is hereby made part of this decree, as if set forth herein.

The said verdict and the pleadings in the cause being considered, It is further adjudged and decreed by the Court as follows:

That the defendant Western Union Telegraph Company is without lawful right or authority to use and occupy any portion of the right of way of the Western & Atlantic Railroad, and it is hereby commanded to cease and wholly desist from such use and occupation, of the portions thereof described in the said verdict in the answer of the jury to Question No. 4 of the special questions submitted by the Court to the jury, from and after twelve months from June 5th, 1922.

That the defendant Western Union Telegraph Company, its officers, servants, and agents, be and it and they are hereby perpetually enjoined from such use and occupancy of the portions of said right of way described in the said verdict as above stated, for the conduct of its business or the maintenance of any poles, wires or structures employed in connection therewith and from entry upon or commission of any act of trespass on said right of way so described, incident to or in connection with the operation and conduct of its business, and from in any wise disturbing or interfering with the free and unrestricted possession and use of the said right of way, so described, by or in behalf of the State of Georgia and its lessee, the Nashville, [fol. 535] Chattanooga & St. Louis Railway, from and after twelve months from the 5th day of June, 1922.

That the defendant, the Western Union Telegraph Company, must and shall remove its wires, poles, structures and appurtenances from said right of way, as so described in said verdict of the jury in answer to said Question No. 4, that is to say within twelve months from the final determination of this cause.

It is further adjudged and decreed that the plaintiffs do recover of the defendant, for the use of the officers of Court the sum of \$— costs of court.

This decree signed June 14th, 1922.

W. D. Ellis, Judge of the Superior Court of Fulton County,  
Georgia.

[File endorsement omitted.]

[fols. 536-538]

FULTON SUPERIOR COURT

[Title omitted]

BILL OF EXCEPTIONS—Filed June 28, 1922

Be it remembered that at the May Term, 1922 of the Superior Court of Fulton County, Georgia, the above cause came on to be

heard, and upon the conclusion of the introduction of evidence by the plaintiffs defendant on May 18th, 1922 moved orally for a nonsuit on the ground that plaintiffs' evidence did not prove the allegations of the petition and did not warrant a verdict for plaintiffs. The court orally denied said motion. Upon said decision or judgment the Western Union Telegraph Company assigns error of which it complains.

Be it further remembered that on June 5th, 1922, during said May Term, 1922, of said Superior Court, the jury trying said cause rendered the following verdict, to-wit: [Omitted in printing.]

[fols. 539 & 540] Thereafter on the 14th day of June, 1922, during said term of court, the Western Union Telegraph Company presented to the Judge of said Court its motion for a new trial in said case praying that said verdict be set aside, that until the decision upon said motion should be rendered the said verdict be superseded, and that a rule nisi be issued requiring the plaintiffs to show cause why said motion should not be granted.

At the same time the plaintiffs in said cause presented to the Judge of said Court a form of decree upon said verdict, and prayed that the same be signed. The Western Union Telegraph Company thereupon objected to the signing of any decree until a decision upon its motion for new trial should be rendered; and prayed that the supersedeas prayed on its motion for new trial should be granted, and that the signing of a decree be stayed and postponed until the motion for new trial should be decided.

The Court overruled said objection of the Western Union Telegraph Company, and thereafter on June 14th, 1922, rendered the following decree. To the overruling of said objection and to said decree the Western Union Telegraph Company excepted and now excepts, and assigns error thereon, said decree being: [Omitted in printing.]

[fol. 541] Be it further remembered that prior to the rendition of said decree the Western Union Telegraph Company objected thereto upon the following additional grounds:

The provision of the decree: "That the defendant, the Western Union Telegraph Company, must and shall remove its wires, poles, structures and appurtenances from said right of way, as so described in said verdict of the jury in answer to said Question No. 4, that is to say within twelve months from the final determination of this cause," is a mandatory injunction not called for or supported by, nor permissible under, the allegations of the petition in the cause, does not follow, and is not supported by, the verdict, and is unauthorized in equity or by law.

The decree, in so far as it relates to right of way or land in the State of Tennessee, and particularly in so far as it adjudicates the title and ownership thereof, is without authority of law, and the court is without jurisdiction to so adjudicate.

The rendition of the decree, notwithstanding the presentation of

defendant's motion for new trial which had been presented before the decree had been signed, and before decision on said motion, [fol. 542] and notwithstanding the prayer of defendant for an order superseding the verdict rendered in the cause, is erroneous and without authority of law.

Each said objection to the rendition of said decree was overruled by the court, and the decree above set forth was thereafter signed.

The Western Union Telegraph Company then and there excepted to the overruling of said objection to said decree, and to the signing of said decree, and now excepts thereto and assigns error thereon, of which it complains. And now before final judgment in said cause, and at the terms at which said decree, decisions and judgments above complained of were rendered, and within the time allowed by law therefor, the Western Union Telegraph Company comes and tenders this its bill of exceptions pendente lite for the purpose of being made a part of the record and prays that the same be certified to be true by the judge and be ordered placed on the record.

W. L. Clay, Dorsey, Brewster, Howell & Heyman, Attorneys  
for Western Union Tel. Co.

I do certify that the foregoing bill of exceptions pendente lite is true, and the same is hereby ordered filed and made a part of the record in this cause.

In open court, this June 28, 1922, at the May Term, 1922, of Fulton Superior Court.

W. D. Ellis, Judge S. C. A. C.

[File endorsement omitted.]

[fols. 543-545]

FULTON SUPERIOR COURT

[Title omitted]

#### MOTION FOR NEW TRIAL

The jury trying the above cause having on June 5th, 1922, during the May Term, 1922, of the Superior Court of Fulton County, Georgia, rendered the following verdict: [Omitted in printing.]

[fol. 546] And the Western Union Telegraph Company being dissatisfied with said verdict now comes, during the term of court at which said verdict was rendered, and before the adjournment thereof, and within 30 days of said trial, and moves that the said verdict be set aside and that a new trial be granted upon the following grounds, to-wit:

1. Because the verdict is contrary to evidence.
2. Because the verdict is decidedly and strongly against the weight of the evidence.

3. Because the verdict is not supported by evidence.
4. Because the verdict is contrary to law and to the principles of equity and justice.

Wherefore, the Western Union Telegraph Company prays that said verdict be set aside, that a new trial be granted, that a rule nisi requiring the plaintiffs in this cause to show cause, if any they have, why a new trial should not be granted, and that pending a decision upon this motion said verdict be superseded by the order of this court, and that additional time be allowed defendant within which to prepare and present a brief of evidence in this cause.

W. L. Clay, Dorsey, Brewster, Howell, Heyman, Attorneys  
for Western Union Telegraph Company.

[fol. 547]

#### FULTON SUPERIOR COURT

[Title omitted]

#### ORDER TO SHOW CAUSE

The above motion of the Western Union Telegraph Company for a new trial, etc., being considered, the grounds thereof are hereby approved. Let the plaintiffs in said cause show cause before me on the 16th day of Sept., 1922, or as soon thereafter as a hearing can be had, why the prayers of defendant for a new trial should not be granted.

Let service be made upon said plaintiffs or their counsel of record, of this rule and order, within — days from this date.

It appearing that it may not be possible to prepare a complete brief of the evidence in said cause during the present term of the court, or within 30 days from the rendition of said verdict, *or within 30 days from the rendition of said verdict*, it is further ordered that said defendant be given until the final hearing of said motion within which to make out, have approved and filed its brief of evidence, and in which to amend, perfect and have approved its motion for a new trial.

It is further ordered that this order shall operate as a supersedeas to said verdict and to the decree thereon until the decision on said motion is signed and filed, and during the period thereafter allowed by law for the suing out of a bill of exceptions to the Supreme Court.

In open court this June 14, 1922.

W. D. Ellis, Judge Superior Court, Atlanta Circuit.

[fol. 548] Service of the above and foregoing motion for new trial, together with the order of the Court issued thereon, is hereby acknowledged. All other and further service is waived.

This June 14, 1922.

Hooper Alexander, Tye, Peebles & Tye, Attys. for Plffs.

## IN FULTON SUPERIOR COURT

ORDER OVERRULING MOTION FOR NEW TRIAL—Filed June 14, 1922

Upon consideration of said motion for new trial, after argument had, it is ordered that said motion be overruled and a new trial be denied.

This Nov. 2nd, 1922.

W. D. Ellis, Judge S. C. A. C.

[File endorsement omitted.]

[fol. 549]

## FULTON SUPERIOR COURT

[Title omitted]

AMENDMENT TO MOTION FOR NEW TRIAL—Filed Oct. 31, 1922

Now comes the Western Union Telegraph Company, Defendant in the above cause and amends its motion for new trial heretofore filed by adding thereto the following grounds:

5. The court erred in refusing to permit counsel for the defendant, in his opening statement to the jury of the issues in the case, before the introduction of any evidence, to state that the defendant denied that the State of Georgia in constructing, operating and owning the Western & Atlantic Railroad did so in its sovereign capacity as alleged in the petition, and from stating that the defendant claimed that the State of Georgia did so in the capacity of an individual and with only such rights as attach to a citizen in constructing, operating and owning a railroad; that the Western & Atlantic Railroad was a private enterprise.

This movant contends it was entitled under the pleadings to have this statement made to the jury, and particularly because of the allegations of paragraph I of the petition and defendant's denial thereof in its answer, and particularly in paragraph XII of the amendment thereto.

6. The court erred in stating to counsel during their argument as to what issues were left in the case in the presence of the jury before the introduction of evidence and during the statement of defendant's counsel of the issues in the case:

"I am disposed to hold in this case with Judge Pendleton's decision that the State owned this property in its Sovereign capacity and not as an individual."

The error being that the judge trying the case thereby

(a) Expressed an opinion on the facts.

[fol. 550] (b) Invaded the province of the jury in deciding one of the issues to be tried by the jury, towit, whether the state owned

the Western & Atlantic Railroad in its sovereign capacity or as an individual with only the rights of a citizen therein.

7. The court erred in stating and in ruling in the presence of the jury before the introduction of evidence in the case, and while counsel for the parties were stating to the court and jury the issues in the case:

"It seems to me you gentlemen, as well as myself, will have to be governed by the rulings of Judge Pendleton, and what he has ruled out, I hold is out of the case."

The error being that, while Judge Pendleton on motion of plaintiffs struck certain allegations in defendant's answer and in defendant's pleas, and while proof of stricken allegations in pleas may not be admissible in support of such pleas, yet they were admissible under issues remaining in the case and under denials in the answer not stricken, and particularly under the denials of the allegations made in Paragraphs XII, XIII, XIV and XV of defendant's answer.

This movant contends this ruling of Judge Ellis excluded evidence not only in support of pleas filed by the defendant in which allegations were stricken, but also denied to the defendant the right to introduce in evidence under issues remaining in the case and under its denial, proof of facts supporting defendant's denial and the general issue raised thereby. This movant further contends this ruling of the trial judge was made particularly in respect to, and in denial of, the right of the defendant to contest, and to disprove, allegations of the petition

(a) That the State owned the property of the Western & Atlantic Railroad in its Sovereign capacity and not as an individual.

[fol. 551] (b) That the State is the exclusive owner of the land upon or through which is the right of way of the Western & Atlantic Railroad, and is not merely the owner of an easement or right of way through or over said land for railroad purposes.

And denied defendant the right to claim and to prove

(c) That the defendant had obtained a grant in perpetuity of easements in that land for the maintenance, construction and operation of its telegraph lines.

(d) That the Western Union Telegraph Company had obtained good prescriptive title to perpetual easements in the land in and over which its telegraph lines are situate against the owners of that land.

8. The court erred in permitting plaintiffs, over defendant's objection then interposed, upon ground below stated, to introduce in evidence Paragraph 1287 of the Code of Georgia, reading:

"Western & Atlantic Railroad property of the State. The railroad communication from Atlanta, in Fulton County, to Chattanooga, on the Tennessee River, is the property of this State exclusively, and shall be known as the Western & Atlantic Railroad."



Plaintiffs' counsel at the time stated:

"It is introduced for the purpose of showing that it is a declared law of this state that the line of Railroad known as the Western & Atlantic is the sole and exclusive property of the State."

Defendant's counsel then and there objected to the introduction in evidence of said paragraph 1287, Georgia Code, upon the grounds:

It does not lie in the power of the State any more than in an individual to make a self serving declaration.

The State has no power to make a self serving declaration of its title that is competent to prove its title, but title must be proven [fol. 552] by competent evidence and by the best evidence.

The evidence offered is not competent evidence to prove title. This declaration made by the State of Georgia and the Nashville, Chattanooga & St. Louis Railway, claiming under it, does not take the place of a deed to the State of Georgia, nor is that declaration competent for the jury to consider as proof that the State is owner or has title.

9. The court erred in permitting plaintiffs, over defendant's objection then interposed, upon grounds below stated, to introduce in evidence Par. 1515 of the Code of Georgia, reading:

"For the support and maintenance of the common schools of this State, the poll-tax, special tax on shows and exhibitions, dividends upon the stock of the State in the Bank of the State of Georgia, Georgia Railroad and Banking Company and such other means or moneys as now belong to the common-school fund, and one half of the proceeds of the rental of the Western and Atlantic Railroad, or one half the annual net earnings of said railroad under any change of policy which the State may adopt hereafter; all endowments, devises, gifts, and bequests made, or to be made to the State or State board of education; the proceeds of any commutation tax for military services; all taxes that may be assessed on such domestic animals as from their nature and habits are destructive to other property; any educational funds belonging to the State (except the endowment of and debt due to the University of Georgia); and such other sums of money as the legislature shall raise by taxation or otherwise for educational purposes, are hereby declared to be a common-school fund."

Plaintiffs' counsel claimed that Par. 1515 of the Georgia Code should be admitted in evidence, stating:

"It has a bearing as showing the contention of the state and how the State holds and treats this property, and has always done so;" and

[fol. 553] "This section shows it is public property, and the income is a part of the public revenue, devoted under the laws of the State to Public use."

The defendant's counsel then and there objected to the same upon the grounds:

It is irrelevant and not material to any issue in the case:

Any proof of what the State does with any of its revenue, or any revenue derived from the Western & Atlantic Railroad, whether under lease or operation, does not illustrate or show the character of ownership, whether by the state in its Governmental capacity or in its private capacity, ownership being one thing and the application of revenue derived from it being another.

The court overruled defendant's objection and admitted in evidence said par. 1515 of the Code of Georgia, and in so doing erroneously ruled and held, in the presence of the jury:

"I think any part of the public law is admissible and ought not to be rejected if it tends to illustrate the status *or* this property, if it does, and it belongs to the State of Georgia and it belongs to the State in its sovereign capacity. Does it belong to it in any other capacity, does it own it like it might own any other piece of property, for some other purpose; or tending to illustrate, if it does, the title to the State's property and the particular manner in which it holds it, and the particular manner may be appealed to, to illustrate the rights that happen to come into conflict with what the State conceives to be its rights."

10. The court erred in permitting plaintiffs, over defendant's objections then interposed, upon grounds below stated, to introduce in evidence Article 7 Section 13, Par. 1, of the Constitution of Georgia reading:

"The proceeds of the sale of the Western & Atlantic, Macon and [fol. 554] Brunswick, or other railroads held by the State, and any other property owned by the State, whenever the General Assembly may authorize the sale of the whole or any part thereof, shall be applied to the payment of the bonded debt of the State, and shall not be used for any other purpose whatever, so long as the State has any existing bonded debt: Provided, that the proceeds of the sale of the Western and Atlantic Railroad shall be applied to the payment of the bonds for which said railroad has been mortgaged in preference to all other bonds."

Defendant's counsel then and there objected to the same upon the grounds:

It is irrelevant, and not material to any issue in the case:

Neither the sale of said property nor the application of the proceeds thereof is competent to show, or to prove ownership, title, or the character of ownership, operation or possession.

11. The court erred in ruling out the following testimony of Hunter McDonald, a witness for plaintiffs, in the employ of the Nashville, Chattanooga & St. Louis Railway, a plaintiff, as chief engineer since 1892, and prior thereto resident engineer on the Western & Atlantic Railroad under the Nashville, Chattanooga &

St. Louis Railway, and who stated that he had access to what purported to be copies of deeds for right of way purposes to the Western & Atlantic Railroad, to wit:

"There are deeds that give right of way for the Western & Atlantic R. R. over or through certain land lots; that is nearly all give right of way through my lands in certain land lots, generally calling for a width of 33 feet on each side for railroad purposes. The general character of those deeds is that the landlord generally gives a right of way through his land for 33 feet on each side of the railroad."

[fol. 555] The court admitted in evidence so much of said statement of the witness as proved the existence of deeds, but excluded the witness' statement of the contents of those deeds upon the objection of plaintiffs' counsel.

This movant contends the testimony is material—

Showing that the State of Georgia did not hold a railroad right of way as land originally belonging to it in its sovereign capacity, but acquired that land, as an ordinary individual would acquire it, from private citizens who owned said right of way and the land through which it extended at and prior to acquisition by the State of Georgia.

Being an admission against the Nashville, Chattanooga & St. Louis Railway.

Connecting the deeds under which the state acquired title with the particular land through which the right of way extended.

It removed and overcame the claim stated in the petition in this case that the State of Georgia was the owner of said right of way in its sovereign capacity, and was entitled to the exclusive possession of said right of way and property.

In making it necessary for the plaintiffs to prove the alleged title to right of way and property by means of deeds from private citizens, and dispelling the claim of plaintiffs that a presumption existed in their behalf that this right of way and land was acquired by the State in its sovereign capacity, and in that manner held and occupied.

12. The court erred in excluding the following testimony of Hunter McDonald, a witness for the plaintiffs:

"I know that the Western Union Telegraph Company owns and operates telegraph lines on and along railroads all over the United States."

Plaintiffs' counsel moved to exclude this testimony on the ground [fol. 556] that it was immaterial and not permissible under the pleadings.

Defendant's counsel at the time said objection was made stated to the court that said testimony was material and relevant; was admissible under the pleadings and particularly under paragraph III of defendant's answer; and was material in showing the extent of the lines of the Western Union Telegraph Company, the public interest

therein, the character of the system of telegraph in which the telegraph lines along the Western and Atlantic was a link, and its importance as such link.

13. The court erred in excluding the following testimony of Hunter McDonald, a witness for the plaintiffs:

"Generally speaking, telegraph lines of the Western and Atlantic are located with the same general system of location as along the Louisville & Nashville Railroad, which I had examined."

Defendant's counsel stated that this testimony was admissible, the witness having qualified as an expert, and defendant was entitled to prove by the expert knowledge of this witness that the construction and location of telegraph lines along the Western & Atlantic Railroad is the same as that generally prevailing along other railroads.

14. Hunter McDonald, a witness for plaintiffs, testified that he had made a special study of telegraph lines along the Louisville & Nashville Railroad at one time, was asked by counsel for defendant:

"How long had that telegraph line along the L. & N. been in existence, which you say you have examined?"

Plaintiffs' counsel objected to the witness being permitted to answer this question. The court sustained the objection and in so doing erred.

[fol. 557] 15. The court erred in permitting plaintiffs, over defendant's objection then and there interposed upon grounds below stated, to introduce in evidence an act of the State of Georgia, entitled "An act to authorize the lease of the Western & Atlantic Railroad, and for other purposes therein mentioned," approved October 24, 1870, Ga. Laws 1870 p. 423 and particularly the following language therein:

"Section 1. The General Assembly of Georgia do enact that his Excellency, the Governor of this State, be, and he is hereby, authorized to lease the Western & Atlantic Railroad which is the property of the state, together with all its houses, work shops, depots, rolling stock and appurtenances of every character."

Plaintiffs' counsel then stated that they offered said Act "for all purposes which it may serve," and "our contention is going to be that it is but one of a number of statements by the legislature of the State of Georgia as to the ownership of that road. Our court has held that recitals of facts in public acts are evidence. They are subject to rebuttal, of course. If the State of Georgia does not own the right of way of the Western & Atlantic Railroad, and assertion in an act might be prima facie evidence, but of course it would be subject to be rebutted, this act is evidence, so far as it goes, of everything that is in it. That is our position in regard to it."

Defendant's counsel then and there objected to the introduction

of said act, and particularly to the portion above quoted therefrom upon the following grounds:

It is a self serving declaration by the State of Georgia of ownership of the Western & Atlantic Railroad. That declaration is not competent evidence to establish title.

The language objected to does not state what the state is owner of, nor whether it is the owner of an easement in the land only, or the owner of the land, or what interest in the land is claimed to be owned.

This declaration of ownership by the General Assembly of Georgia, if admitted in evidence, would invade the province of the Judiciary. It is for the courts to hear and pass upon evidence—not for the legislature and the legislature is not empowered to assert and determine that the state has title, nor is such declaration *prima facie* a judgment binding on a private citizen moreover the Nashville, Chattanooga & St. Louis Railway, a party plaintiff invokes such declaration of the legislature without investigation by the legislature of the ownership and it is not within the scope of the title of the act and is therefore unconstitutional.

The court then overruled defendant's objection, admitted the evidence, and in so doing erroneously ruled in the presence of the jury:

"I think I will admit the testimony as a declaration of the State of its claim, but I will reserve the right to pass on it and submit to the jury the effect of that sort of declaration."

16. The court erred in permitting plaintiffs, over defendant's objections then interposed upon grounds below stated, to introduce in evidence the lease of the Western & Atlantic Railroad by the State of Georgia to Western & Atlantic Railroad Company, dated December 27, 1870, signed by Rufus B. Bullock, for the State of Georgia and by Joseph E. Brown for the Western & Atlantic Railroad Company, and particularly the following portion thereof:

"I, Rufus B. Bullock, Governor of the State of Georgia, by virtue of the power and authority vested in me by the aforesaid act of the General Assembly of Georgia, do hereby grant, convey and lease to the Western & Atlantic Railroad Company, composed of the persons whose names are herein given, and to their successors, representatives, heirs, or assigns, the said Western & Atlantic Railroad, which is the property of the State of Georgia, together with all the houses, work shops, depots, rolling stock and appurtenances of every character."

Defendant's counsel then and there objected to the introduction in evidence of the said lease and of the portion thereof above quoted, [fol. 559] upon the following grounds:

It is a self serving declaration of ownership.

It is not the highest and best evidence of title and is incompetent to prove it.

The court then overruled defendant's objections and in so doing erroneously ruled in the presence of the jury:

"I admit it in evidence as a declaration on the part of the state but not as a conclusion of the fact by the state. It is a presumption, but it is a disputable presumption. A declaration on the part of the state of the ownership of the property about to be leased may carry a presumption that it is the owner, but it is a disputable presumption."

17. The court erred in permitting plaintiff over defendant's objections then interposed upon grounds below stated, to introduce in evidence the lease of the Western & Atlantic Railroad by the State of Georgia to Nashville, Chattanooga & St. Louis Railway, dated July 19, 1890, signed by J. B. Gordon, Governor of the State of Georgia and by J. W. Thomas, as President of the Nashville, Chattanooga & St. Louis Railway, and particularly the following language therein.

"Whereas the undersigned, John B. Gordon, Governor of said state in strict compliance with the Act of the General Assembly of said state \* \* \* made an advertisement which was a definite proposal for bids, as authorized by the said act, for the lease of the said Western & Atlantic Railroad, together with all its houses, work shops, rolling stock, depots and appurtenances of every kind and character, being the property of said state."

And the following language:

"Now this indenture \* \* \* witnesseth that said party of the first part (the state of Georgia) \* \* \* does hereby lease to the party of the second part, viz, to the Nashville, Chattanooga & St. Louis Railway, the said Western & Atlantic Railroad, a railroad [fol. 560] running from City of Atlanta in State of Georgia to the City of Chattanooga in the State of Tennessee, together with all its houses, work shops, rolling stocks, depots and appurtenances of every kind and character, being the property of the State of Georgia."

Defendant's counsel then and there objected to the introduction in evidence of said lease and of the portion thereof above quoted, upon the following grounds:

It is a self serving declaration of ownership.

It is not the highest and best evidence of title, and is incompetent to prove it.

It is too indefinite to define what the state claims to own.

18. The court erred in permitting plaintiffs, over defendant's objections then interposed upon grounds below stated, to introduce in evidence the lease of the Western & Atlantic Railroad by the State of Georgia to Nashville, Chattanooga & St. Louis Railway, dated May 11, 1917, executed by N. E. Harris, Governor of the State of Georgia, in behalf of the State, and by John Peyton Howe, President, Nashville, Chattanooga & St. Louis Railway, and particularly to the following portions thereof:



(a) "The said party of the first part (the State of Georgia) \* \* \* does hereby lease \* \* \* to the Nashville, Chattanooga & St. Louis Ry., the said Western & Atlantic Railroad, the railroad running from the City of Atlanta in the State of Georgia to the City of Chattanooga in the State of Tennessee, including the terminals thereof and its property other than its railroad property not connected with either of its terminals. Together with all of its houses, work shops, rolling stocks, depots and appurtenances of every kind and character, belonging and pertaining to said railroads."

Defendant's counsel then and there objected to the introduction of evidence of said lease, and the portion thereof above quoted upon the following grounds:

[fol. 561] It is a self serving declaration of ownership.

It is not the highest and best evidence of title and is incompetent to prove it.

It is too indefinite to define what the state claims to own.

(b) "Tenth. The right of the party of the second part to sublet any part of the property not useful for railroad purposes shall be exercised subject to the terms, conditions, obligations and requirements of the said Acts of the General Assembly and of this contract of lease."

"Fourteenth. The right is hereby expressly reserved to the party of the first part (State of Georgia) to remove and cause to be discontinued any or all encroachments and other adverse uses and occupancies in and upon the right of way or upon other properties of the Western & Atlantic Railroad, or any part thereof, whether maintained under claim of lawful right or otherwise; and to this end the party of the second part hereby consents that the State may withhold delivery of possession, or right of possession to the party of the second part of such parts of the right-of-way and other properties as may be so adversely used and occupied, until such encroachments and other adverse uses and occupancies shall have been removed or discontinued; and the State of Georgia may, at its option and in such manner as it may deem best, proceed to remove such encroachments, uses and occupancies, acting therein in its own name and behalf as the owner of the property. It is further understood and agreed that the party of the second part will, if and when so requested, join with the State and become a party to any proceeding, judicial or otherwise, that may be instituted by and on behalf of the State for the purpose of freeing the right-of-way and property of the Western & Atlantic Railroad from all adverse uses and occupancies; provided that nothing herein shall be construed as applying to the tenants and licenses of the present lessee.

[fol. 562] "It is understood and agreed that when such adverse uses and occupancies shall have been removed by judicial proceedings or otherwise the use of the same for the remaining period of the lease shall inure to the benefit of the party of the second part to the same extent as the other portions of the right-of-way and properties



herein conveyed shall inure to it under the terms and provisions of this contract."

Defendant's counsel then and there objected to the introduction of said act and particularly to the portions last above quoted thereupon the following grounds:

It does not relate to lines and easements of the Western Union Telegraph, nor to any encroachment or wrongful occupancy by the Western Union Telegraph Company, or state that such lines and easements belonged to, or were or are in the possession of, the State of Georgia.

Said lease, and the portions quoted, are incompetent to show, or indicate that there was an encroachment by the Western Union Telegraph Company, or that the State of Georgia was in fact the owner or possessor of title.

The said act and the said language does not show and define the property which might or might not have been occupied, or what was, or was not, the property which was subservient, or might be subservient, in use, or what was or what was not an encroachment, trespass or wrongful possession, or who was the encroacher, trespasser, or wrongful possessor.

Thereupon the court overruled defendant's objections, and erroneously ruled and stated in the presence of the jury:

"I have not admitted any of these things as absolute proof of the facts. I have admitted these things as declarations on the part of the State in its published laws, of its claims and contentions in respect to this matter. This is as far as I have gone in this case, and I make the same ruling as I did before."

[fol. 563] 19. The court erred in permitting plaintiffs, over the objection if defendant then and there interposed upon grounds below stated, to introduce in evidence fragments of defendant's answer in this cause, the plaintiffs not introducing the entire answer but only fragments thereof, many of which fragments are incomplete statements, often only a portion of a sentence; qualifying statements made in the answer in connection with the portions omitted, not being offered and not being introduced in evidence by the plaintiff. The said portions of the answer so offered and admitted in evidence being the following:

(a) "From Paragraph I of original answer:

"Defendant admits that under and by virtue of an act of the General Assembly of Georgia, entitled "An act to authorize the construction of a railroad communication from the Tennessee line, near the Tennessee river to the point on the southeastern bank of the Chattahoochee river, most eligible for the running of branch roads, thence to Athens, Madison, Milledgeville, Forsyth and Columbus; and to appropriate moneys therefor," approved December 21st 1836, and the several act- amendatory thereof, the State of Georgia constructed "a railroad communication" known as the Western & Atlantic Railroad extending from the City of Atlanta in the State of Georgia through

the counties of Fulton, Cobb, Bartow, Gordon, Whitfield and Catoosa, in the State of Georgia, and the county of Hamilton in the State of Tennessee, to the City of Chattanooga, Tennessee. Defendant admits that the said Western & Atlantic Railroad was constructed out of public funds."

Other qualifying statements in the answer not offered or put in evidence by the plaintiffs are to the effect that for the lack of sufficient information defendant can neither admit or deny that the Western & Atlantic Railroad was constructed solely out of public funds:

And the following which has been stricken on plaintiffs' demurrer thereto:

That the defendant could neither admit or deny what stock, if [fol. 564] any, was issued; that the State of Georgia did not own the land upon which its railroad and right of way is situated, but merely owned an easement therein for railroad purposes; that the State of Georgia is not the owner of land over which the Western & Atlantic Railroad is constructed and operated commonly known as the right of way of the Western & Atlantic Railroad; that the telegraph lines of the Western Union Telegraph Company, and the easement or interest in land held, used and enjoyed by the Western Union Telegraph Company, and necessary for the construction, maintenance and operation of those lines along the Western & Atlantic Railroad, do not belong to the State, but belong to the Western Union Telegraph Company.

(b) "From Paragraph I of original answer:

"Defendant admits that the State of Georgia is the owner of said Western & Atlantic Railroad and of said easements or rights of way necessary therefor."

Immediately following the above language and separated from it by a mere comma is the following language not offered or put in evidence by the plaintiffs, and which had been stricken on demurrer thereto:

"but expressly denies that either the lines of telegraph of defendant upon, along or over said right of way, or the land taken therefor or the easements and rights of way in said land necessary for the construction, reconstruction, maintenance and operation thereof, belong to the State of Georgia; but on the contrary defendant alleges that said lines of telegraph hereinafter more particularly described, and the land taken therefor, and said easements necessary therefor are, and continuously for a long period of time have been, in the exclusive and adverse possession of the Western Union Telegraph Company, which is the sole owner in fee simple thereof.

"Defendant denies that the said Western & Atlantic Railroad, including its right of way and terminals, is owned by the State of Georgia in its sovereign or governmental capacity. On the contrary [fol. 565] this defendant alleges that the State of Georgia embarked,

Rai  
unc  
Gec

pursuant to said statutes of Georgia, in the construction, maintenance and operation of a railroad, an enterprise usually carried on by individual persons or companies, and in so doing it waived, and has always waived, its sovereign character in respect to the ownership, construction, maintenance and operation of said railroad, and in respect to relations brought about or existing between itself as the owner, constructor, maintainer and operator of said railroad, on the one hand, and the public and third persons on the other hand, and particularly in respect to this defendant and its predecessors in title in owning, possessing, constructing, maintaining and operating lines of telegraph and the easements necessary therefor upon and along said Western & Atlantic Railroad. In so embarking in the ownership and construction of, and in maintaining and operating, said Western & Atlantic Railroad either directly or through any lessee, the said State of Georgia in respect thereto became, and at all times has been, subject to the laws and regulations applicable to, and binding upon, private persons, private corporations and ordinary railroad corporations, owning, constructing, maintaining and operating a railroad; and the State of Georgia assumed all the obligations and all of the liabilities incident to such ownership and business when carried on by individuals; and this defendant and its predecessors in title acquired as against and from the State of Georgia, under grants and permits and contracts given or entered into by the State of Georgia with this defendant and its predecessors in title, hereinafter alleged, [fol. 566] and under the conduct and action or non-action of the State of Georgia, hereinafter alleged and by adverse use and possession by defendant and its predecessors in title of said lines of telegraph and the easements necessary therefor, hereinafter alleged, the same rights and title which the Western Union Telegraph Company and its predecessors in title would have acquired and become possessed of under like grants, permits and contracts made by, and under like conduct, action and non-action of private persons, private corporations and ordinary railroad companies, and by like adverse use and possession against private persons, private corporations, and ordinary railroad corporations. The Supreme Court of the State of Georgia has so adjudicated and decreed in the case of Western & Atlantic Railroad vs. Carlton 28 Ga. 180, and in Schofield vs. Georgia (as owner of Western & Atlantic Railroad), 54 Ga. 635. The Supreme Court of Tennessee has so held in Western & Atlantic Railroad Company vs. Taylor 8 Heisk 408, and in Hutchinson vs. Western & Atlantic Railroad Co. 6 Heisk 634."

And the following portion of Par. I of answer not stricken :

"Except as herein admitted the allegations of the first paragraph of the petition are denied."

(c) "From Paragraph II of original answer:

"Defendant admits that the Nashville, Chattanooga & St. Louis Railway, a corporation of the State of Tennessee, pursuant to, and under the terms and provisions of, an act of the General Assembly of Georgia, approved November 30th 1915, and the acts amendatory

thereof, entered into a lease-contract with the State of Georgia under which it became a body politic and corporate under the laws of Georgia under the name and style of The Western & Atlantic Railroad (hereinafter sometimes referred to as the present lessee), and under said lease-contract became the lessee of the said Western & Atlantic Railroad;"

Immediately following the language above quoted, and separated from it by a mere *simicolon*, is the following statement not [fol. 567] offered or put in evidence by the plaintiffs, and neither demurred to nor stricken:

"but this defendant expressly denies that said present lessee under said lease contract or otherwise has acquired any right, title or interest whatsoever in or to the lines of telegraph now owned by the Western Union Telegraph Company, hereinafter more fully described, or in or to the easements and rights in land necessary therefor; and defendant denies that said lines of telegraph and the easements and rights in land necessary therefor are included within, or are covered by, said lease-contract.

"Except as herein admitted the allegations of the second paragraph of the petition are denied."

(d) Copy from Par. IV of original answer:

"Defendant admits that the Western & Atlantic Railroad was until the 27th day of December, 1870, operated by the State of Georgia in the manner and upon the conditions set forth in the foregoing acts,"

Immediately following the language above quoted but not offered or introduced in evidence by the plaintiffs is the following statement, separated from the language quoted by a mere comma, and which had been stricken from the answer on plaintiffs' motion:

"not in a sovereign capacity, but as hereinabove alleged in the capacity of a private person and subject to the same rules and laws as were applicable to the ownership and operation of a railroad by a private person or corporation, and as were applicable to contracts made by, and the conduct, action and non-action of, private persons or corporations owning and operating a railroad."

Immediately preceding that portion of defendant's answer in par. IV introduced in evidence by the plaintiffs is a statement of the several acts referred to in said portion of said answer offered in evidence, being acts of the State of Georgia approved on the following [fol. 568] dates: December 21, 1836; December 23, 1837; December 4, 1841; December 22, 1843; December 23, 1847; December 30, 1847; January 15, 1852; December 19, 1860; together with a statement of the material provisions of said acts, all of which were stricken on plaintiffs' demurrer thereto, but was not offered or introduced in evidence, notwithstanding the fact that the admissions in defendant's answer, introduced in evidence, expressly states that the same

is "in the manner and upon the conditions set forth in the foregoing acts" and is an essential part of the admission put in evidence.

(e) From Par. IV of original answer:

"Defendant admits that, pursuant to an act of the General Assembly of Georgia, approved October 24th, 1870 (acts of 1870, page 423), the Western & Atlantic Railroad was leased to a corporation known as the Western & Atlantic Railroad Company for a term of twenty years."

Immediately following the above quotation is the following language not offered or introduced in evidence by the plaintiffs, and which had been stricken on plaintiffs' motion:

"This defendant denies that the lines of telegraph then upon, over and along the right of way of the Western & Atlantic Railroad, or the easements necessary for the construction, maintenance and operation thereof, were then owned by the State of Georgia or that they were covered by said lease. On the contrary, defendant alleges that said lines of telegraph and said easements necessary therefor had long previously been, and then and during the entire term of said lease and until the termination thereof and thereafter up to the present time were and are possessed and owned exclusively and adversely by it, the Western Union Telegraph Company."

[fol. 569] (f) From Par. IV of original answer:

"Defendant admits that, pursuant to an act of the General Assembly of Georgia, approved November, 12th, 1889 (acts 1889, page 362), the Western & Atlantic Railroad was for a term of twenty years beginning December 27, 1890, leased to the Nashville, Chattanooga & St. Louis Railway, which by virtue of said act and lease then became a corporation under the law of Georgia under the name and style of the Western & Atlantic Railroad Company."

Immediately following the language above quoted is the following statement, not offered or introduced in evidence by the plaintiffs, and which had been stricken from the answer on plaintiffs' motion:

"This defendant denies that the lines of telegraph then upon, over and along the right of way of the Western & Atlantic Railroad, or the easements necessary for the construction, maintenance and operation thereof, were then owned by the State of Georgia, or that they were covered by said lease. On the contrary, defendant alleges that said lines of telegraph and said easements necessary therefor had long previously been, and then and during the entire term of said lease and until the termination thereof and thereafter up to the present time were and are, possessed and owned exclusively and adversely by it, the Western Union Telegraph Company."

and the following which had neither been objected to by the plaintiffs nor stricken:

"This defendant has not a copy of said lease and requires proof thereof to be made.

"Except as herein admitted the allegations of paragraph 4 are denied."

(g) From Par. V of original answer:

"Answering the allegations of paragraph 5 of the petition this defendant admits that pursuant to an act of the General Assembly of Georgia, approved November 30th, 1915, and the amendments thereto, the Western & Atlantic Railroad was leased for a term of 50 years beginning December 27, 1919 to the Nashville, Chattanooga & St. Louis Railway, which under the provisions of said act and as said lessee became a corporation of the State of Georgia under the name and style of Western & Atlantic Railroad."

Immediately following the language above quoted is the following statement, not offered or introduced in evidence by the plaintiffs, and which had been stricken from the answer on plaintiffs' motion:

"This defendant denies that the lines of telegraph then upon, over and along the right of way of the Western & Atlantic Railroad, or the easements necessary for the construction, maintenance and operation thereof, were then owned by the State of Georgia, or that they were covered by said leases. On the contrary, defendant alleges that said lines of telegraph and said easements necessary therefor had long previously been, and then and during the entire term of said lease and until the termination thereof and thereafter up to the present time were and are, possessed and owned exclusively and adversely by it, the Western Union Telegraph Company."

And the following which had neither been objected to by the plaintiffs nor stricken:

"This defendant requires proof to be made of said lease.

"Except as herein admitted the allegations of the fifth paragraph of the petition are denied."

(h) From Par. VI of original answer:

"Answering the allegations of the 6th paragraph of the petition this defendant admits that it is maintaining and operating over, upon or along what is known as the right of way of the Western & Atlantic Railroad between the City of Atlanta, Georgia and the City of Chattanooga, Tennessee telegraph lines, poles, wires and [fol. 571] other appurtenances owned possessed and employed by it in the conduct of its telegraph business,"

Immediately following the language above quoted but not offered or introduced in evidence by the plaintiffs is the following statement, separated from the language quoted by a mere comma, and stricken from the answer on plaintiffs' motion:



"and it has continuously so owned, possessed, maintained and operated the same, together with the easements and interest in land necessary therefor, from the time of its acquisition thereof on or about the 12th day of June, 1866, to the present time, and prior thereto its predecessors in title so owned, possessed, maintained and operated the same from the date of first construction about the year 1850 as hereinafter set forth. The said telegraph lines, poles, wires and appurtenances and the easements necessary therefor were at all times aforesaid continuously and adversely owned, possessed, used and occupied by defendant and its predecessors in title."

(i) From Par. VI of original answer:

"This defendant admits that its use and occupation of said right of way, and the possession, maintenance and operation of said lines of telegraph and of said easements necessary and useful therefor, is contrary to the will and consent of the Nashville, Chattanooga & St. Louis Railway, both as a corporation under the law of the State of Tennessee and as lessee of said railway and a corporation of the state of Georgia under the name and style of Western & Atlantic Railroad;"

Immediately following the above quotation and separated from it by a mere semicolon is the following allegation neither offered or introduced in evidence by the plaintiffs, and stricken from defendant's answer on plaintiffs' motion.

[fol. 572] "but this defendant alleges that neither said Nashville, Chattanooga & St. Louis Railway nor said Western & Atlantic Railroad a corporation of Georgia as aforesaid, has any right, power or authority to object to the possession, construction, maintenance and operation of said lines of telegraph, or to object to the possession, use and enjoyment of the aforesaid easements and interest in land in, through, upon and over what is known as the right of way of the Western & Atlantic Railroad; nor have they or either of them any right, power or authority whatever to interfere with the possession, use, enjoyment, construction, maintenance and operation thereof by defendant. Any interference with, and any removal of, said lines of telegraph from the right of way of the Western & Atlantic Railroad, and any Georgia statute, law, judgment or decree so requiring, will deprive defendant of its lawful rights and properties vested in, and secured to, it by the laws and constitutions of Georgia and of the United States, and will be unjust and inequitable to defendant, not only under and because of the facts above alleged, but also under and because of the following facts:"

The facts therein referred to and immediately thereafter set up in the answer consist of allegations that the cost of this telegraph line is very great; that the poles, wires and fixtures of said line, if removed, would be greatly broken and damaged and would not be available for the construction of another line elsewhere; that the removal of this line would destroy a link in defendant's large system of telegraph



throughout the United States of more than 192,000 miles of poles and cables and result in corresponding great loss to defendant; that neither the State of Georgia nor any other person has ever objected to the construction, maintenance and operation of said telegraph lines along the Western & Atlantic Railroad, except the claims made by first lessee, the Western & Atlantic Railroad under the lease of 1870 which claims were denied by the Supreme Court of the United States as set forth in defendant's answer; that the cost of constructing and [fol. 573] maintaining these telegraph lines from the time of first acquisition by the Western Union Telegraph Company, alleged elsewhere in the answer to have been in the year 1866, and by its predecessors in title from about the year 1850, alleged elsewhere in the answer, was at great cost and expense; that the volume of business passing over defendant's lines of telegraph mentioned in the petition is very great and includes telegrams in which the public, the Government of the United States, and its officials and departments, are interested, and that the laws of the United States and of Georgia impose penalties upon defendant should it fail to transmit such telegrams over said lines along the Western & Atlantic Railroad and makes the destruction and abandonment of those lines unlawful.

In addition to the foregoing allegations in Par. VI of defendant's answer, not offered or introduced in evidence by plaintiffs, are the following statements therein:

"Defendant denies that the use and occupation of said right of way and the possession and enjoyment of the easements and interest in land above described necessary for the construction, reconstruction, maintenance and operation of said lines of telegraph is without authority from the State of Georgia. This defendant further denies that the same constitutes an unlawful encroachment upon the right of way of the Western & Atlantic Railroad. On the contrary, defendant alleges that the State of Georgia has given and granted to this defendant and its predecessors in title under and through whom defendant claims, full power and authority to construct, reconstruct, maintain and operate in perpetuity said lines of telegraph upon, along, in, over and through said right of way; and the State of Georgia has granted and given to this defendant and also to its predecessors in title under and through whom defendant claims, the easements and interest in said right of way and land above described necessary and useful for the construction, reconstruction, maintenance and operation in perpetuity of said lines of telegraph.

[fol. 574] "The permits and grants aforesaid from the State of Georgia to the predecessors in title of this defendant, the conveyances from such predecessors in title under which this defendant claims to be possessed of such easements, and the grants and permits from the State of Georgia to this defendant itself are:"

The permits and grants so referred to are stated at length in the answer, together with a statement of the various muniments of title and links in the chain of title under which this defendant

claims under the grants and permits of the State of Georgia to its predecessors in title, all of which qualifies and explains the admissions made in defendant's answer which plaintiffs introduced in evidence as hereinabove shown. All of this was stricken from the answer on plaintiff's motion with the exception of statements therein setting up a contract between the State of Georgia and Garst & Bean about October 10, 1850, authorizing the construction of a telegraph line along the Western & Atlantic Railroad; the Georgia act of January 27, 1852, incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company, which act gave the Augusta, Atlanta & Nashville Magnetic Telegraph Company perpetual easements for the construction, maintenance and operation of the first line of telegraph constructed along said railroad, and the following conveyances in said chain of title, to wit: A conveyance from A. D. Hammett to William S. Morris et al. September 1, 1858; A conveyance from George S. Wiley to William S. Morris, et al., November 13, 1858; and a conveyance from William S. Morris et al. to the American Telegraph Company, dated December 28, 1859; a conveyance from American Telegraph Company to defendant dated June 12, 1866; each of which conveyances are in the answer alleged to convey telegraph lines along the Western & Atlantic Railroad from Atlanta to Chattanooga, Tenn. Said paragraph VI of the answer also contains allegations additional to the foregoing and not offered or put in evidence by the plaintiffs, to wit: A contract between the State of Georgia and Western Union Telegraph Company in 1870, expressly giving the latter perpetual easements for its telegraph lines [fol. 575] along the Western & Atlantic Railroad; a suit in the U. S. Court in the Northern District of Georgia, which went on appeal to the Supreme Court of the U. S., resulting in a judgment upholding said contract of 1870, which was followed by an adjustment between the parties to that suit in accordance with the provisions of said contract; resolutions and statutes of the General Assembly of Georgia and statutes of the State of Tennessee, statutes of the United States, allegations of adverse possession by this defendant and its predecessors in title, creating a prescriptive title and estopping and debarring the State of Georgia and the Nashville, Chattanooga & St. Louis Railway, its present lessee, from any right to have or maintain this action against defendant; all of which allegations were stricken from defendant's answer upon motion of plaintiffs

(j) From Par. VIII of original answer:

"Defendant admits that the General Assembly of the State of Georgia passed an act entitled 'An act to provide for the leasing or other disposition of the Western & Atlantic Railroad and its properties for the creation of a commission to effectuate such purpose and to define its powers and duties; making an appropriation for the cost of the work required, and for other purposes,' which was approved November 30th, 1915.

"Said act created a commission 'authorized and empowered to lease and contract for the leasing of the railroad properties known as the Western & Atlantic Railroad, including the terminals thereof,

and its property other than its railroad property not connected with either of its terminals'; directed said commission to make a report to include 'a full and complete inventory of all personal property, rolling stock, equipment, supplies, tools, etc., to be included in the lease as received from the present lessee'; directed the commission to consider and determine, among other things:

[fol. 576] "7. What, if any, property is owned by the Western & Atlantic Railroad, not useful for railroad purposes, that could be properly and advantageously disposed of separately from the lease of the road.

"8. What, if any steps should be taken to assert the right and title of the State to any part of the right of way or properties of the road that may be adversely used and occupied.'

"And required the Commission to cause to be prepared, if not otherwise obtainable, complete and accurate surveys, copies profiles and easements showing:

"2. The extent and character of every use or occupation of the right of way, tracks and other properties of the road by any person or corporation other than the lessee, and the authority therefor.

"3. The properties not used or apparently not useful for railroad purposes, with an estimate of the market value of such properties, and the use to which they might be applied.'

"Said commission was by said act further instructed and directed to prepare bills for presentation to the General Assembly to carry into effect any recommendation which it might make 'with respect to what steps should be taken to assert the right and title of the State to any part of the right of way or any part of the road that may be adversely used or occupied; and with respect to any other recommendations which, in its opinion, and which may require legislation by the General Assembly of Georgia to fully, completely and adequately protect all the interests of the State of Georgia in regard to said road and all of its parts and properties, whether reckoned as surface, overhead or underground rights.'

"Defendant admitw that the General Assembly of Georgia amended the last mentioned act by the adoption of an act entitled 'An Act to [fol. 577] amend an Act approved November 30th, 1915, providing for the leasing or other disposition of the Western & Atlantic Railroad and its properties, and for the creation of a commission to effectuate such purpose, and for other purposes, by adding thereto other provisions further defining the powers and duties of the said commission; and for other purposes,' approved August 4th, 1916.

"The amendment last mentioned contains language purporting to give the commission created by the said act of November 30th, 1915 full power and authority in its discretion to deal with and dispose of any and all encroachments upon, and use and occupations of, any part of the right of way and properties of the Western & Atlantic Railroad by any person other than the lessee under said act, its tenants and licenses whether such encroachments, use or occupancy be permissive, or adverse, and whether with or without claim of right therefor; to determine whether such encroachments, uses

and occupations or any of them shall be removed and discontinued, or whether they or any of them shall be permitted to remain, and if so to what extent and upon what terms and condition; with further authority to adjust, settle and finally dispose of any and all controversies that may exist or that may arise with respect to any adverse use or occupancy or any part of said right of way and properties of the Western & Atlantic Railroad in such manner and upon such terms and conditions as said commission may deem the best interest of the State require; and provides that all contracts and agreements made or entered into by said commission in settlement or disposition of matters touching such adverse uses and occupations shall be binding upon the State of Georgia; and further authorizing and empowering said commission to take such action as it might deem proper and expedient to cause the removal and discontinuance of any encroachment, use or occupancy of said right of way and [fol. 578] properties which in its opinion should be removed or discontinued, and to that end the commission was authorized and empowered to institute and prosecute in the name and behalf of the State of Georgia such suits and other legal proceedings as it might deem appropriate in protection of the State's interest or the assertion of the State's title.

"Defendant admits that the present lease contract contains in it a reservation of a claimed right to remove or to cause to be discontinued any and all encroachments and other adverse uses and occupancies in and upon the right of way of the Western & Atlantic Railroad, whether maintained under any claim of lawful right or not, and that to that end the Nashville, Chattanooga & St. Louis Railway consented to the withholding of delivery of possession or right to possession of such portions of said properties, rights of way as may be so adversely used and occupied until encroachments and other adverse uses and occupancies had been discontinued; with the further provision therein that the State of Georgia may at its option in such manner as it may deem best proceed to remove such encroachments, uses and occupancies in its own name and as the owner of the properties, and that to such proceedings the Nashville, Chattanooga & St. Louis Railway would become a party. For the exact and complete terms of said lease, defendant refers to the lease itself and requires proof thereof."

Immediately following the above quotation are the following allegations in paragraph 8 of defendant's answer, neither introduced nor offered by the plaintiffs and stricken from the answer on their motion:

"Defendant admits that said Western and Atlantic Railroad Commission has recently on a date unknown to defendant passed a resolution with preamble and recitals therein, a copy of which is hereto attached as Exhibit 14. Defendant for lack of sufficient information is unable to admit or deny any act or resolution by said commission [fol. 579] other than as herein admitted, nor the allegation that this suit is brought in accordance with authority and direction from said

Commission. Defendant denies that said Commission has such power and authority, and denies that the Governor of Georgia and the Secretary of State of Georgia, who executed and delivered said lease, had any power and authority to insert in said lease the aforesaid provisions, or to make the claims or assert the rights in said provisions made, or to contract with respect thereto, and particularly in so far as such provisions, claims, and claimed rights, apply to this defendant, and its said lines of telegraph and easements.

"Defendant denies that the act of November 30th, 1915, or any amendment thereof authorizes and empowers said commissioners therein appointed

"To adopt said resolution, or to give the direction or authority therein set forth; or

"To take any act, or to institute this suit, or to institute any proceeding;

"To question or attack defendant's right to maintain, construct, reconstruct and operate in perpetuity its said lines of telegraph above described, or to attack defendant's right and title thereto and to the perpetual easements and rights in land necessary therefor; or

"To attack or to seek to annul or have adjudged ineffective in any way or to any extent the grants and permits given by the State of Georgia to defendant and its predecessors in title by the statutes and resolutions of the State of Georgia hereinabove alleged; or

"To attack or impair any right or title in or to, or possession of, said easements and rights in, on, along, through or over the right of way of the Western & Atlantic Railroad, acquired as aforesaid by defendant or its predecessors in title; or

"To remove or to interfere with defendant's said lines of telegraph [fol. 580] and easements; or

"To prevent or defeat the performance by defendant of its obligations under, or to deprive defendant of the rights, properties and franchises acquired by it under, the said act of Congress and its amendments.

"Defendant alleges, if the Georgia Act of November 30th, 1915, or any amendment thereto has the force and effect and delegates the authority hereinabove denied by this defendant, but which defendant understands to be claimed for it by complainants in this suit and by said Commissioners appointed under said act, then said statute is opposed to the Constitutions of the United States and of Georgia; and in any event the said act and resolution of the said commissioners, and this suit, and any judgment or decree of any court giving to said statute the force and effect herein by defendant denied to it, but claimed in this suit by said complainants, and any judgment or decree of any court upholding, giving effect to, or enforcing said resolution of said Commissioners, and any judgment or decree of any court, granting the prayers of the petition in this cause, will be violative of the constitutions of Georgia and of the United States in that thereby

"(a) There will be an impairment of the obligations of contracts by a statute or law passed or made subsequently which violates

Georgia Constitution Art 1 Sec. 3, Par. 2;

United States Constitution Art. 1, Sec. 10, Par. 1.

"(b) The State of Georgia will have made and enforced a law revoking grants of privileges or immunities granted to defendant and its predecessors above alleged in such manner as to work injustice to defendant which violates

Georgia Constitution Art. 1, Sec. 3, Par. 3.

"(c) The rights, privileges and immunities which as above alleged have vested in, or accrued to, defendant under and by virtue of the acts of the General Assembly of Georgia will not be held inviolate [fol. 581] by all courts before whom they may be brought in question, which violates

Georgia Constitution Art. 12, Sec. 1, Par. 5.

"(d) Thereby property of defendant will have been taken without due process of law which violates

Georgia Constitution Art. 1, Sec. 1, Par. 3.

" " Art. 1, Sec. 3, Par. 1.

United States Constitution 14th Amendt.

(k) From Par. XV of First Amendment to Answer:

"Answering the 6th paragraph of the petition, defendant admits that it is maintaining and operating along the Western & Atlantic Railroad between the City of Atlanta, Georgia and the City of Chattanooga, Tennessee, telegraph lines, poles, wires and other appurtenances employed by it in the conduct of its telegraph business, the location of which is generally described in defendant's original answer."

Immediately following the above quotation but neither offered nor introduced by the plaintiffs are the following allegations:

"It denies that the land and easements occupied or taken for the construction, maintenance, operation and use of its said telegraph lines, poles, wires and other appurtenances employed by defendant in the conduct of its telegraph business is the right of way or the property of the Western & Atlantic Railroad or of the complainants in this cause or either of them. Except as herein denied this defendant for the want of sufficient information can neither admit nor deny what title, ownership or interest the complainants or either of them have in the land upon, over or through which the said Western & Atlantic Railroad is constructed or the property denominated in the petition as right of way of the Western & Atlantic Railroad and requires strict proof thereof.

"Defendant denies that its said use and occupation of the land, [fol. 582] easements and rights taken and used by it for the con-



struction, maintenance and operation of its telegraph lines, poles, wires and other appurtenances employed by it in the conduct of its telegraph business is without authority from the State of Georgia.

"Defendant admits that its said use and occupation of the land, easements and rights taken, used and occupied by it for the construction, maintenance and operation of its telegraph lines, poles, wires and other appurtenances employed by it in the conduct of its telegraph business is contrary to the will and consent of the Nashville, Chattanooga & St. Louis Railway, as lessee of the Western & Atlantic Railroad.

"Defendant denies that its use and occupation of the land, easements and rights taken, used and occupied by it for its telegraph lines, poles, wires and other appurtenances employed by it in the conduct of its telegraph business is an unlawful encroachment upon said right of way; but admits that its taking, use and occupation of said land, easements and interest are adverse uses thereof."

To the introduction in evidence of the above mentioned fragments of defendant's answer, set forth in paragraphs (a) to (k), inclusive and each of such fragments so offered in evidence, defendant then and there objected upon the grounds that plaintiff could not introduce fragments and portions of the answer or of the amendment; could not introduce in evidence fragments of one document, but could only introduce in evidence the entire document itself, the entire answer and the entire amendment respectively, from each of which plaintiff offered in evidence fragments; the fragments offered as admissions are only a portion of the admissions, and are directly connected in the answer with statements qualifying, limiting and explaining the admissions, and particularly with those portions thereof above specified and not offered in evidence; the fragments [fol. 583] introduced by the defendant as admissions is only a portion or half of the admission, and like a portion or half of a truth is misleading and often the opposite of what the whole truth or admission is. These objections were urged to each fragment of evidence Par. (a) to (k) above mentioned as the same was offered in evidence.

The court overruled defendant's objections and held that the plaintiff could introduce as admissions made by the defendant the foregoing fragments of its answer and amendment, and each of such fragments.

Error is assigned upon the allowance of each fragment in evidence with the same force and effect as if made in a separate ground of this motion.

20. After plaintiffs had announced that they rested and had no further evidence to introduce in chief, defendant sought to read to the jury from its answer and the first amendment thereto as evidence put in by the plaintiffs the portions of defendant's answer and the portion of paragraph 15 of the amendment thereto stated or quoted in the last proceeding, ground of this motion, therein stated not to have been offered or introduced in evidence by the plaintiffs. The



court thereupon, and upon plaintiffs' objections denied defendant the right to so read to the jury as evidence introduced by plaintiffs the portions of said answer and amendment not offered in evidence by the plaintiffs. Defendant did not offer itself to introduce in evidence such portions of such answer or amendment, but claimed that the legal result of the introduction by the plaintiffs of portions of said answer and amendment, respectively, was that the whole answer, and the whole amendment, respectively, was introduced in evidence, and that the defendant had the right to read the above mentioned portions thereof, and any portion thereof, to the jury as evidence introduced by the plaintiffs; that the portions of the answer and of the amendment introduced in evidence by the plaintiffs as admissions should be considered by the jury in connection with the portions not read to the jury by them, as the true effect of the admission [fol. 584] claimed could only be ascertained and determined by a consideration by the jury of all parts of the admission; that any portion of said answer or of the said amendment which had been stricken upon plaintiffs' motion, while no longer a portion of the pleadings in the case, necessarily stood and existed as a portion of the admissions made in the answer and in the amendment thereto, and were portions thereof still remaining even though stricken from the pleadings.

The plaintiffs objected to the right of the defendant to read to the jury as evidence put in by them any portion of the answer and amendment thereto, and particularly the portions above referred to which plaintiffs had not read to the jury in evidence as admissions by the defendant, on the ground that such portions had not been put in evidence by plaintiffs; objected to the reading to the jury those portions of the answer and of the amendment thereto stricken upon their formal motion, upon the ground that any portion of the pleading stricken was out of the case and could no longer be considered for any purpose by the jury as evidence; and objected upon the further ground that said portions of the answer and of the amendment were irrelevant and immaterial.

The court erred in denying to the defendant the right to read the above specified portions of its answer and the amendment thereto to the jury as a part of the evidence which the plaintiffs had introduced; and erred in sustaining the objections of the plaintiffs.

Plaintiffs' counsel, notwithstanding the foregoing rulings did not object to the defendant reading to the jury after the close of testimony for plaintiff under the right claimed as hereinabove stated, plaintiffs not conceding that right, the following portions of said answer and of said amendment, to wit:

(a) From Par. II of the answer.

"But this defendant expressly denies that said present lessee under said lease contract or otherwise has acquired any right, title or interest whatsoever in or to the lines of telegraph now owned by the Western Union Telegraph Company, hereinafter more fully described, or in [fol. 585] or to the easements and rights in land necessary therefor;

and defendant denies that said lines of telegraph and the easements and rights in land necessary therefor are included within, or are covered by, said lease-contract.

"Except as herein admitted, the allegations of the second paragraph of the petition are denied."

(b) From Par. IV of the answer.

"Except as herein admitted the allegations of paragraph 4 are denied."

(c) From Par. V of the answer:

"Except as herein admitted the allegations of the 5th paragraph of the petition are denied."

(d) From Par. VI of the answer:

"Whereafter by an act of its General Assembly approved January 27th 1852, the State of Georgia incorporated the Augusta, Atlanta & Nashville Magnetic Telegraph Company for the purpose of doing the business of a telegraph company from Augusta, Georgia through Atlanta to the City of Nashville, Tennessee, with the usual powers of corporations, including the power to purchase, hold, sell and convey property. In and by said act the State of Georgia expressly ratified and affirmed the said contract entered into between the said William L. Mitchell, Chief Engineer of the Western & Atlantic Railroad, and G. W. Garst and J. M. Bean on the part of said Augusta, Atlanta & Nashville Magnetic Telegraph Company, and further expressly enacted in said act

"That the Augusta, Atlanta & Nashville Magnetic Telegraph Company, shall have power and authority to set up their fixtures along and across any high road or high roads; and any railroad which now or may hereafter belong to this State and any waters or water courses of this State."

"Under and by virtue of said contract and statute, the first line of [fol. 586] telegraph upon and along the Western & Atlantic railroad was constructed, established and operated, and the Augusta, Atlanta & Nashville Magnetic Telegraph Company was thereby granted, and acquired, perpetual, irrevocable and assignable easements for the construction, maintenance and operation thereof.

"(6) On the first day of September, 1858, the said Alvin D. Hammett conveyed to said William S. Morris et al. all of the telegraph lines, properties and easements formerly belonging to the Augusta, Atlanta & Nashville Magnetic Telegraph Company, and particularly those situate upon or along the Western & Atlantic Railroad from the City of Atlanta to the dividing line between the States of Georgia and Tennessee, a copy of which is hereto attached marked Exhibit 3.

"(7) On the 13th day of November, 1858, the said George L. Willy conveyed to William S. Morris et al. all of the telegraph lines, properties and easements formerly belonging to the Augusta, Atlanta & Nashville Magnetic Telegraph Company in the State of Tennessee extending from the City of Chattanooga upon or along the Western &

Atlantic Railroad to the dividing line between the States of Georgia and Tennessee, copy of which is hereto attached marked Exhibit 4.

"(8) On the 28th day of December, 1859, said William S. Morris et al. conveyed to the American Telegraph Company all of the telegraph lines, properties and easements acquired by them as aforesaid extending from the City of Chattanooga in the State of Tennessee to Atlanta in the State of Georgia, copy of which conveyance is hereto attached marked Exhibit 5."

(e) From Par. XV of the amendment to the answer:

"It denies that the land and easements occupied or taken for the construction, maintenance, operation and use of its telegraph lines, poles, wires and other appurtenances employed by defendant in the conduct of its telegraph business is the right of way or the property of the Western & Atlantic Railroad or of the complainants in [fol. 587] this cause or either of them. Except as herein denied this defendant for the want of sufficient information can neither admit nor deny what title, ownership or interest the complainants or either of them have in the land upon, over or through which the said Western & Atlantic Railroad is constructed or the property denominated in the petition as right of way of the Western & Atlantic Railroad and requires strict proof thereof.

"Defendant denies that its said use and occupation of the land, easements and rights taken and used by it for the construction, maintenance and operation of its telegraph lines, poles, wires and other appurtenances employed by it in the conduct of its telegraph business is without authority from the State of Georgia.

"Defendant admits that its said use and occupation of the land, easements and rights taken, used and occupied by it for the construction, maintenance and operation of its telegraph lines, poles, wires and other appurtenances employed by it in the conduct of its telegraph business is contrary to the will and consent of the Nashville, Chattanooga & St. Louis Railway, as lessee of the Western & Atlantic Railroad.

"Defendant denies that its use and occupation of the land, easements and rights taken, used and occupied by it for its telegraph lines, poles, wires and other appurtenances employed by it in the conduct of its telegraph business is an unlawful encroachment upon said right of way; but admits that its taking, use and occupation of said land, easements and interest are adverse uses thereof."

(f) From Par. XVII of the answer.

"Defendant alleges that thereafter in a suit brought by Camp & Hammett against the Augusta, Atlanta & Nashville Magnetic Telegraph Company in the Superior Court of Cobb County a judgment [fol. 588] or decree was rendered under which all of the properties of the Augusta, Atlanta & Nashville Magnetic Telegraph Co., including its telegraph lines and rights of way along the Western & Atlantic Railroad were sold. All of the records of Cobb Superior Court were destroyed during the Civil War sometime between the

Par. 7 of answer:

7. Defendant admits the allegations of paragraph 7 of said petition."

Par. 8 of petition:

"8. The defendant has addressed to your petitioner a paper, copy of which is hereto attached (except a copy of the blue-print or plat therein referred to, copy of which is not necessary to be here exhibited), marked "Exhibit A," in which it seeks to notify petitioner that it, the defendant purposes to condemn so much of the right of way or petitioner as may be necessary for the use of defendant for the purpose of constructing, maintaining and operating a telegraph line along and upon such right of way between Atlanta, Georgia, and the line of the State of Tennessee, and also on what is styled the 'Rome Branch' of petitioner between Kingston, Georgia, through the Counties of Bartow and Floyd, to Rome Georgia, a distance of approximately 18.1 miles. In said notice defendant seeks to notify petitioner that it has appointed W. G. Humphrey as its assessor to meet with the assessor to be appointed on petitioner's behalf and such third assessor as shall be legally selected, in the office of the Ordinary of Fulton County, Georgia, on the fifth day of February, 1912, for the purpose of appraising the value of said right of way, interests and easements, and in consequential damages, if any; and requesting petitioner to select an assessor."

Par. 8 of answer:

"8. In answer to the allegations of paragraph 8 of said petition, defendant admits that it has instituted condemnation proceedings against petitioner substantially as averred in said paragraph."

[fol. 592] Par. 9 of petition:

"9. As will be observed by reference to said Exhibit, the defendant proposes to condemn the right of way held by petitioner under said lease from the State of Georgia, upon the east side of its main line tracks from the Marietta Street bridge in Atlanta to Howells Yard in Fulton County, Georgia, then to cross the tracks and continue on the west side thereof to the North end of Hills Park in said County, and then to cross the tracks and continue on the east side thereof to the 6-mile post of the railroad, and at said point to divide and a part of the line to cross to the West side of said tracks, and from said 6-mile post to the Tennessee State line to be and extend on both sides of said tracks as now located, except at certain points specified in said notice and not material to be here repeated. Under said proposed condemnation proceeding, as shown in said notice, it is designed and intended to condemn the right of way of your petitioner under said lease for and during the term extending to the expiration of said lease, for approximately the whole distance from Atlanta, Georgia to the Tennessee State Line, on both sides of petitioner's railroad, with lines of poles and wires placed at an average distance from the main line track of 27 feet, with a minimum dis-

tance from the edge of the right of way of 6 feet and to occupy substantially the portions of the right of way now occupied by the lines of poles and wires, and it is further proposed and sought to have wires crossing the tracks of petitioner from the main telegraph lines at all the stations of your petitioner from Atlanta to Graysville, Georgia."

Par. 9 of answer:

"9. Defendant admits that it proposes to condemn the right of way held by petitioner under said lease from the State of Georgia, as will appear from the examination of its condemnation notice. While it has not compared the exhibit attached to said petition, it presumes the same is correct, but asks leave, wherever material, [fol. 593] to refer to said original condemnation notice."

Par. 11 of petition:

"11. Petitioner further shows that its right of way so leased is of the width of only 33 feet from the center of its main line and upon each side of said center, and that the portion of the right of way sought to be condemned and now occupied by defendant with the poles and wires strung thereon, is at the average distance of 27 feet from said main line and of 6 feet from the edge of the right of way, upon both sides of its main line, from said 6-mile post to the Tennessee State line."

Par. 11 of answer:

"11. Answering paragraph 11 of said petition, this defendant avers on information and belief that the allegations thereof are substantially correct."

A portion of Par. 17 of petition:

"17. Petitioner shows to the Court that said right of way is the property of the State of Georgia, held by this petitioner under said lease."

A portion of Par. 17 of the answer:

"17. This defendant admits that said right of way is the property of the state of Georgia; that it is held by petitioner under lease."

A portion of Par. 20 of answer:

"20. Answering paragraph 20 of said petition, defendant alleges that it is necessary for it, in the carrying on of its business, to condemn the portion of the right of way set out in its notice."

[fol. 594] Exhibit "A" attached to petition and referred to in paragraph 8 thereof:

## "EXHIBIT 'A'"

"To the Western & Atlantic Railroad Company:

"You are hereby notified that the Western Union Telegraph Company, a corporation existing under the laws of the State of New York, but doing business in the State of Georgia, and having complied with the laws of the State of Georgia, and being authorized, under said laws, to condemn so much of the right of way of a railroad company as may be necessary for its use for the purpose of constructing, maintaining and operating its telegraph line along and upon such right of way, and having been unable to agree with you upon just and adequate compensation for the right of way and easements sought to be acquired, proposes and intends to acquire from you by condemnation, upon the payment of just and adequate compensation therefor, along the right of way of your railroads in Georgia, a right of way upon which to construct (when necessary), maintain and operate its telegraph line.

"The location of the right of way sought to be acquired is substantially that location now occupied by the telegraph line of the Western Union Telegraph Company along main line of your railroad from Atlanta, Ga., to the Tennessee line at or near Graysville, Ga., and along the Branch line known as the Rome branch.

"Said location is more specifically defined as follows:

"Main Line

"This line runs from Atlanta, Ga., to the Tennessee State line at or near Graysville, Ga., through the counties of Fulton, Cobb, Bartow, Gordon, Whitfield and Catoosa, a distance of approximately 121.37.

"Said telegraph line will enter upon the right of way of your railroad at the Marietta street bridge at the same point where it now enters upon your right of way on the east side of your main line [fol. 595] tracks, and will continue on the east side of your tracks for a distance of forty-five poles to the north end of Howell's Yard, a point 110 feet north of the 3rd mile post. At this point said line will cross your tracks and continue on the west side of the tracks 110 poles to the north end of Hills Park, at a point 1,905 feet north of the 5th mile post. At this point, said line will cross your tracks and continue on the east side of said tracks 32 poles to the 5th mile post, at which point said line will divide, and part of said line cross to the west side of said railroad tracks. From the 6th mile post to the Tennessee State line, said line will extend on both sides of said tracks as now located, except at the following points:

"At Marietta, the wires on the east side of the track will cross to the west side at a point 690 feet south of the present passenger depot at Marietta, and run along with wires on the west side for a distance of 94 poles, as now located, said east wires crossing back to the east side at a point 2,150 feet north of the 22d mile post.

"At Adairsville, the wires on the east side of the track will cross over to the west side of the track at a point 1,638 feet south of the

passenger depot, and extend along with wires on the west side for a distance of 20 poles, as now located, to a point 1,285 feet north of the passenger depot at Adairsville, at which point said wires will cross back to the east side of track.

"At Dalton, Ga. the wires on the east side of the track will cross over to west side of tract at a point 742 feet south of 99th mile post, and extend along the west side to a point 225 feet *feet* south of passenger depot, where they will cross to the east side, and extend along the east side to a point 600 feet north of passenger depot, where they will cross to the west side and extend along the west side to a point 1,000 feet from passenger depot, where they will return to the east side.

[fol. 596] "Over the tunnel near Tunnell Hill, said wires will consolidate, extending over the tunnel, as now located.

"The right of way thus sought to be acquired by the Western Union Telegraph Company shall be of sufficient width to enable it to conveniently construct (when necessary) maintain and operate its line located and constructed substantially as follows:

"As many wires or cables of wire as may be necessary from time to time to transact the business of said company. These wires or cables are to be strung on poles placed at an average distance from the center of your present main line track of twenty-seven (27) feet, except where your right of way is limited or widened, with a minimum distance from edge of right of way (except where right of way is limited or widened), of six (6) feet. The poles shall have a length of not less than twenty (20) feet, and shall be placed in the ground a depth of not less than four (4) feet, and have a circumference of about thirty (30) inches at the bases and twenty (20) inches at the top. At highways, railway crossings, depots and side tracks, said poles shall have a height of from twenty-five (25) to forty (40) feet above the ground. There will be an average of forty (40) poles per mile on said telegraph line on both sides of said tracks from Atlanta, Ga., to Kingston, Ga., and of thirty (30) poles per mile from Kingston, Ga., to the Tennessee line. Said poles will nowhere be placed upon any of the embankments or in the cuts of your railway, nor will said wires be attached or fastened to any of the bridges or trestle work of said railway.

"In order to reach the offices of the Western Union Telegraph Company as now located or to be established by it, there will be wire crossing the tracks of your railroad from the main telegraph line, with one or more poles on the right of way of your railroad, at the following points: Bolton, Marietta, Emerson, Kingston, Vinings, Kennesaw, Cartersville, Adairsville, Smyrna, Acworth, Rodgers, Cal- [fol. 597] houn, Resaca, Dalton, Tunnel Hill, Ringgold and Graysville.

"At all points where said telegraph wires will cross your tracks for reaching offices, the lowest wires will be not less than twenty-five (25) feet above the tracks.

"The Western Union Telegraph Company desires the above described right of way for the purposes herein specified, for a term ex-



piring 27th day of December 1919, said date being the expiration of your lease with the State.

"Rome Branch

"Said line to connect with the main line of the Western Union Telegraph Company at Kingston, and extend thence in a westerly direction, extending along the north side of your track from Kingston to the Southern Railway crossing, crossing your tracks at this point to the south side, and thence extending along the south side of your tracks, through the counties of Bartow and Floyd, a distance of approximately 18.10 miles, to a point about 250 feet from your passenger depot, at which point said line will cross your tracks, leaving your right of way.

"The right of way thus sought to be acquired by the Western Union Telegraph Company shall be of sufficient width to enable it to conveniently construct (when necessary) maintain and operate its line, located and constructed substantially as follows:

"As many wires or cables of wire as may be necessary from time to time to transact the business of said company. These wires or cables are to be strung on poles placed at a distance varying from 12 to 15 and 20 feet from the center of your main line track, with a minimum distance from edge of right of way of three feet. The poles will be of a length of not less than twenty (20) feet, placed in the ground a depth of not less than four (4) feet, and have a circumference of about twenty-six (26) inches at the base and fifteen and one-half (15½) inches at the top. At highway crossings, rail-  
[fol. 598] road crossings, depots and side tracks, said poles shall have a height of from twenty-five (25) to thirty-five (35) feet above the ground. There will be an average of thirty (30) poles to the mile between Kingston and Rome. Said poles will nowhere be placed upon any of the embankments or in the cuts of your railway, nor will said wires be attached or fastened to any of the bridges or trestle work of said railway.

"At all points where said telegraph line will cross your tracks, the lowest wire will be not less than twenty-five feet above the ground.

"The Western Union Telegraph Company desires the above described right of way for the purposes herein specified for a term expiring the 27th day of December, 1919, said date being the expiration of your lease.

"A plat is hereto attached, showing in general outline the right of way proposed to be acquired.

"The Western Union Telegraph Company, being unable by contract to procure the right of way and other interests and easements above set forth, and having been unable to agree with you upon the compensation to be paid therefor.

"You are hereby notified, That said Western Union Telegraph Company proposes to have such right of way, interests and easements above set forth, and consequential damages resulting to the property from which said right of way, interests and other easements are carved, ascertained by condemnation proceedings, as by law in such

cases provided, and has appointed W. G. Humphrey as its Assessor to meet with the Assessor to be appointed in your behalf, and such third Assessor as shall be legally selected, in the office of the Ordinary of Fulton County, Georgia, at 11 a. m. o'clock on the 5th day of February 1912, for the purpose of appraising the value of said right of way, interests and easements above set forth and consequential damages, if any.

[fol. 599] "You are hereby requested to select an Assessor and to do all other things required of you in the premises in such cases made and provided.

"This 18th day of January, 1912.

"The Western Union Telegraph Company. (Signed) G. W. E. Atkins, Vice-President. Attest: Wm. H. Baker, Secretary. (Seal of the Western Union Telegraph Co.)"

Par. 4 of amendment to petition:

"4. The contract between plaintiff and defendant, by virtue of which defendant maintained and operated telegraph lines on the rights of way of plaintiff, expired on August 17, 1912, and defendant was notified by plaintiff on August 5, 1912, that on and after August 17, 1912, the use and occupation by defendant of plaintiff's right of way and of its buildings, &c., for a telegraph line, would be without permission of plaintiff and against its will and consent; that defendant was notified to vacate said right of way, etc., and to commence in good faith to do so not later than September 1, 1912, continuously prosecute said work of removal, and complete the same prior to December 1, 1912, and that in default of such vacating prior to December 1, 1912, plaintiff would take possession of the poles, cross arms, batteries, etc., which remained on plaintiff's right of way. But defendant has not even begun such removal, and, in violation of its contract with plaintiff, terminated on said August 17, 1912, persists in remaining on the rights of way and premises of plaintiff, occupying the same locations along said rights of way as before said [fol. 600] notice was given."

Par 4 of answer to said amendment:

"4. In answer to paragraph 4 of said amendment, defendant admits that said contract expired on August 17, 1912, and admits that prior to the expiration thereof plaintiff gave defendant a written notice to vacate said right of way. Defendant asks that said notice itself be produced into court with the terms thereof. Defendant admits that it has not begun such removal and still occupies the locations along said rights of way that it occupied before said notice was given."

Par. 5 of amendment to petition:

"5. Plaintiff further shows that no re-hearing has yet been had as to plaintiff's prayer in its original petition for temporary injunction, as directed by the decision of the Supreme Court of Georgia

above referred to, but that on or about the 9th day of December, 1912, it was served by defendant with what is styled an "amendment" to defendant's former condemnation notice, in which it is stated that defendant strikes from said condemnation notice so much of the description of the right of way sought and proposed to be condemned as includes a right of way on both sides of the tracks of plaintiff's railroad along the same portion of the right of way, striking from said description the proposed location of a right of way along the right hand side of the railroad going from Atlanta to Chattanooga wherever said description shows a proposed line of telegraph upon the left hand side of the railroad, so that the location of the proposed telegraph right of way of defendant will be substantially as follows: Entering upon the right of way of plaintiff at the Marietta Street Bridge, on the east side of the main line tracks, and continuing on that side a distance of 45 poles to the north end of Howell's Yards, there crossing the tracks and continuing on the [fol. 601] west side 110 poles to the north end of Hills Park, there crossing the tracks and continuing on the east side 32 poles to the 6th mile post, there crossing the track and continuing on the west side of the track to the Tennessee State line, except that at Dalton, Ga., the line will cross from the west side to the east side at a point 225 feet south of the passenger depot and will extend along the east side of the tracks to a point 600 feet north of the passenger depot, and at the tunnel near Tunnel Hill, Ga., the line will extend over the top of the hill as now located.

"It is further proposed, in said alleged amendment, that in the event plaintiff desires to build a telegraph line for telegraph purposes in connection with the operation of its railroad, and for the location of such line selects the location, or any part thereof, heretofore selected by defendant, defendant 'agrees' to shift the location of the proposed telegraph line and the desired right of way and to erect its fixtures, poles and wires, and construct, maintain and operate its telegraph line, upon such portion of said right of way and at such distance from the track of the railroad and the railroad's telegraph line for railroad uses, as will not obstruct or interfere with the ordinary use of said right of way for railroad uses, or of the railroad telegraph line for railroad uses. And said so called amendment notified plaintiff to appoint an assessor to meet with an assessor appointed by defendant, and such other assessor as should be legally selected, at the office of the Ordinary of Fulton County, Georgia, on January 2, 1913, for the purpose of appraising the value of the right of way, interests and easements sought to be condemned, and consequential damages, if any."

Par. 5 of answer to said amendment to petition:

"5. In answer to paragraph 5 of said amendment, defendant admits that on or about December 9, 1912, it served petitioner with an amendment to its condemnation notice, a substantial copy of which is attached to said amendment. Defendant prays reference to said [fol. 602] amendment for the terms thereof."

Par. 3 of defendant's motion to advance the hearing:

"3. Defendant is now occupying with its line of telegraph a right of way on the railroad right of way of said petitioner, under a contract which will expire August 17th, 1912."

Par. 5 of defendant's motion to advance the hearing:

"5. Defendant shows that it is only six months until the contract under which it now occupies the right of way of said petitioner will expire, and that it is very important that the right of defendant to condemn said property, and, if adjudged favorably to defendant, the condemnation proceedings in connection therewith, be had and determined by the expiration of said time."

Defendant's counsel then and there objected to the introduction of said portions of the record in said case No. 24720, and separately to each portion so offered, upon the following grounds:

That a fragment or portion of petition and answer can not be introduced in evidence; the entire document must be introduced in evidence, or none of it can be put in; said evidence, and each of the several portions thereof, were not the highest and best evidence of title in the plaintiff; did not prove title in the plaintiffs; and besides were inadmissible as an estoppel or admission, or as evidence against the defendant for the additional reason that the same had not been plead by the plaintiffs.

The notice of condemnation and the condemnation proceedings is not an admission of title in the plaintiffs, or a lack of title in defendant.

[fol. 603] That does not define or attempt to define just what the right of way of the Western & Atlantic Railroad is. We do not admit that all of the easements in lands upon which, or through which the Western & Atlantic has an easement, belong to the State of Georgia, but only a right of way,—what right-of-way,—right-of-way necessarily for railroad purposes, and when the land was sought to be acquired in 1836, the telegraph was an unknown thing and what was contemplated then was right-of-way for railroad purposes, and not right-of-way for telegraph purposes.

It cannot be said by any strained construction that that admission that the State owned the railroad and its right-of-way, is in conflict with the claim that the right-of-way which the State owned was only an easement in that, and that the ownership of the land itself and all surplus easements and rights were somebody else's to-wit, the land owner's. That the State found it necessary not to acquire the lands but found it necessary to acquire easements in and possess those easements, and to acquire those easements from the individual citizens who were the owners of the land.

[fol. 604] The language of the condemnation notice is simply the statutory language and is merely to condemn such interest, whatever that interest may be, if any, of the person to whom the notice is given. In issue in this case is the title of the plaintiff, alleged in

3  
7  
5

## FULTON SUPERIOR COURT, APRIL TERM, 1858

[Title omitted]

## JUDGMENT

Whereupon it is considered ordered and adjudged by the Court that the plaintiff Enoch R. Mills for the use of Joseph G. W. Mills do have of and recover from the defendant The August, Atlanta and Nashville Magnetic Telegraph Company the sum of Sixteen Hundred and Fifty Two Dollars and Thirty Six Cents as the principal debt and the further sum of Three Hundred and Seventy Five Dollars and Ninety Cents as interest on the said principal debt from the first day of January 1855 up to the 28th of April 1858 and the further sum of — for costs in and about the present suit laid out and *suspended* and the defendant be in mercy, &c.

Judgment signed this April 28th, 1858.

Jethro W. Manning, Plff.'- Atty.

Filed in office this the 24th day of December, 1853.

R. F. Bomar, Clerk.

STATE OF GEORGIA,  
County of Fulton:

## CLERK'S CERTIFICATE

I, Arnold Broyles, Clerk of the Superior Court of Fulton County, Georgia, do hereby certify that the within and foregoing is a true and correct copy of the entire record in the case of "Enoch R. Mills, for use vs. Augusta, Atlanta & Nashville Magnetic Telegraph Co." case No. 9 Fulton Superior Court, Spring Term 1856, "old box" No. 5259, as appear- of file and record in this office.

Witness my hand and seal of office this the 31st day of May, 1922.  
Arnold Broyles, Clerk Superior Court, Fulton County,  
Georgia. (Seal Superior Court, Fulton County, Georgia.)

[fol. 784]

## EXHIBIT Q-2

October Term, 1858

ENOCH R. MILLS for Use of J. G. W. MILLS

vs.

AUGUSTA, ATLANTA AND NASHVILLE TELEGRAPH COMPANY

Manning

Judgment April 28th, 1858

Principal .....	1,652.36
Interest .....	375.90
Clerk .....	5.60
Fi. Fa. ....	.65
Record Proc. ....	2.00
Shef. ....	1/87½
Jury .....	3.00

Fi. Fa. issued May 6th 1858, Handed to Sheriff Love, June 3rd, 1858.

Returned nulla bona, by sheriff October 1, 1858.

STATE OF GEORGIA,  
County of Fulton:

I, Arnold Broyles, Clerk of the Superior Court of Fulton County, Georgia, do hereby certify that the above and foregoing is a true and correct copy of Judgment Entered on Execution Docket A page 258, in the case of, Enoch R. Mills for use of J. G. W. Mills, vs. Augusta, Atlanta and Nashville Telegraph Company, as appear- of file and record in this office.

Witness my hand and seal of office this the 29th day of May, 1922.  
Arnold Broyles, Clerk Superior Court, Fulton County,  
Georgia. (Seal Superior Court, Fulton County, Georgia.)

---

VERDICT

[Title omitted]

We, the jury find for the plaintiff the sum of sixteen hundred and fifty-two dollars, and thirty one cents, besides interest and cost. This April 8th 1858.

William J. Rollider, Foreman.

[fol. 785] STATE OF GEORGIA,  
County of Fulton:

CLERK'S CERTIFICATE

I, Arnold Broyles, Clerk of the Superior Court of Fulton County, Georgia, do hereby certify that the above and foregoing is a true and correct copy of verdict of the jury, in the case of "Enoch R. Mills for use of J. G. W. Mills vs. Augusta, Atlanta & Nashville Magnetic Telegraph Company, as appear- of file and recorded in minutes B page 372 of the records of Fulton County, Georgia.

Witness my hand and seal of office this the 29th day of May, 1922.  
Arnold Broyles, Clerk Superior Court, Fulton County, Ga.  
(Seal Superior Court, Fulton County, Georgia.)

[fol. 786] EXHIBIT "R"

STATE OF GEORGIA,  
Fulton County:

To the Honorable Inferior Court of said County:

The petition of Alfred M. Coffin sheweth that the Augusta, Atlanta & Nashville Magnetic Telegraph Company a body corporate & politic doing business & having an office in the County aforesaid, & using the name of the American Telegraph Company have injured and damaged your petitioner Six Hundred and Eighty Dollars.

For that whereas, said defendant heretofore to-wit on the seventeenth day of October in the year 1859 & before that time & still is a Telegraph Company carrying on the Electric Magnetic Telegraph on the south from Atlanta aforesaid to the City of New York & other intermediate places on the said line, receiving & forwarding weather orders and despatches over the said line, towit from Atlanta aforesaid to New York for hire;

And the said defendant being such Company as aforesaid fraudulently intending to deceive & defraud your petitioner, heretofore towit on the seventeenth day of October in the year Eighteen hundred & Fifty Nine in the County aforesaid, sent to your petitioner in the City of New York on their Telegraph line a fraudulent & forged order for One Hundred & seventy-five Boxes of cheese of the value then & there of Six Hundred & Eighty Dollars which said fraudulent & forged order purported to have been given & as coming from the firm of Maddox & Watkins, a grocery house in Atlanta who was well known to your petitioner, & who was in the practice of sending despatches to your petitioner over the line of the said defendants for goods.

And your petitioner avers that he believing the said order to have come from the said Maddox & Watkins, on the same day to-wit on the seventeenth day of October, 1859, shipped to the said Maddox



& Watkins the One Hundred & Seventy-five Boxes of cheese of the value aforesaid to Atlanta, Georgia, which said Boxes of cheese or any of them the said Maddox & Watkins refused to secure; That the said order was sent by the said defendant without the authority or direction of the said Maddox & Watkins or any other person for them; but on the contrary thereof the said defendants so being such Telegraph Company as aforesaid so carelessly, negligently, fraudulent [fol. 787] lently & deceitfully conducted themselves in the premises by forwarding the aforesaid unauthorized fraudulent and forged order, thereby inducing your petitioner to send the boxes of cheese as aforesaid to the said Maddox & Watkins, that by & through the carelessness negligence fraud & deceit of the said defendants the said boxes of cheese became of no value & were wholly lost to your petitioner.

And whereas also heretofore to wit on the day & year first aforesaid your petitioner received from the said defendant over their Telegraph lines aforesaid a certain other order purporting to have been sent by the aforesaid Maddox & Watkins to your petitioner, And requesting your petitioner to send them One Hundred & Seventy-five boxes of cheese, which was afterwards to wit on the same day, sent by your petitioner to the said Maddox & Watkins Atlanta, Georgia and was of the value of six hundred & eighty dollars.

Which said last mentioned order your petitioner avers, was sent through the carelessness, negligence, fraudulent and improper conduct of the said defendant whereby your petitioner was deceived and induced to send and did send the said last mentioned boxes of cheese to the said Maddox & Watkins.

And which the said Maddox & Watkins refused to receive & the said defendant refused to secure or pay your petitioner therefor.

By means of the premises your petitioner has been & is greatly injured and damaged and has been put to great trouble, expense & inconvenience by reason of the fraudulent and improper conduct of the said defts.

And your petitioner avers that the President of said Augusta Atlanta & Nashville Magnetic Telegraph Company resides out of the State.

To the damage of your petitioner one thousand Dollars & therefore he brings suit & prays process may issue requiring the said defendant to be and appear at the next Superior Court to be held in and for said County then and there to answer your petitioner in an action on the case.

A. W. Stroud, P't'ff's Atty.

[fol. 788] STATE OF GEORGIA,  
Fulton County:

A. M. COFFIN

vs.

AUGUSTA, ATLANTA & NASHVILLE MAGNETIC TELEGRAPH COMPANY

Case

SUMMONS

To the Sheriff of said County, Greeting:

The defendant is hereby required in person or by Attorney to be and appear at the Inferior Court next to be held in and for the County aforesaid on the third Monday in June next then and there to answer the Plaintiff in an action on the case &c., as in default of such appearance said Court will proceed as to justice shall appertain.

Witness the Honorable Jethro W. Manning one of the Judges of said Court this 28th day of May, 1860.

Daniel Pittman, Clerk.

Served Charles G. Campbell Agent with a Copy of the Original by leaving it at his most notorious place of abode. May 31st, 1860.

C. C. Green, Sheriff.

---

ANSWER

And now comes said defendant by its attorneys & says that they are not indebted to said plaintiff in manner & form as is by him herein set forth & of this said defendant puts itself on the country. For further plea the defendant says that the American Telegraph Co. was not in existence and had control of any of the said lines of telegraph on the days charged by said Plff. and this the defendant puts itself on the county.

9th July, 1860.

---

[Title omitted]

ORDER TRANSFERRING CASE

The counsel for plff. and the deft. having consented to transfer this case to the appeal by consent,

It is therefore ordered by the Court that said case be transferred to the Appeal, cost to abide the Court.

A. W. Stroud, Plff's Atty. A. W. Hammond & Son,  
Deft's Atty.

Filed in office May 28th, 1860. Daniel Pittman, Clk.

[fol. 789] STATE OF GEORGIA,  
County of Fulton:

CLERK'S CERTIFICATE

I, Arnold Broyles, Clerk of the Superior Court of Fulton County, Georgia, do hereby certify that the within and foregoing is a true and correct copy of the entire record in the case of, "A. M. Coffin vs. Augusta, Atlanta & Nashville Magnetic Telegraph Co.," case No. 20 Fulton Superior Court, April Term 1860, "Old Box" No. 242, as appear- of file and record in this office.

Witness my hand and seal of office this the 31st day of May, 1922.  
Arnold Broyles, Clerk Superior Court, Fulton County,  
Georgia. (Seal Superior Court, Fulton County, Georgia.)

[fol. 790] EXHIBIT "S" TO AMENDMENT

Articles of agreement, made and entered into by and between The Western Union Telegraph Company, a corporation under the laws of the State of New York, as party of the first part, and The Western and Atlantic Railroad Company, a corporation under the laws of the State of Georgia, as part of the second part,

Witnesseth:

That in order to provide necessary Telegraph facilities for the party of the second part, and to a better understanding of the terms on which the party of the first part shall occupy the line of Railroad of the party of the second part with the line or lines of telegraph wires belonging to the party of the first part, and to permanently settle and define the business relations between the respective parties hereto, it is mutually contracted and agreed in consideration of the respective obligations herein assumed, as follows, towit:

The party of the first part agrees:

First. To set apart on its line of poles along said Railroad a telegraph wire for the exclusive use of said party of the second part.

Second. To equip said line of wire with as many instruments, batteries and other necessary fixtures as said party of the second part may require for use in its Railroad Stations and to put the same in complete working order.

Third. To run said wire into all the offices of said party of the first part along the line of said Railroad.

Fourth. To have said wire set apart for the exclusive use of said Railroad Company in the transmission of messages on the business of said Railroad on and along the line thereof, and all such messages originating at any point on said road, whether sent from, or received at the station of said party of the second part, or the stations of said party of the first part on said road, shall be transmitted and delivered free of charge.

Fifth. When the wire set apart to said Railroad Company shall [fol. 791] not be in working order, to transmit free of charge over other wires of said telegraph company, the messages of the Officers and agents of the party of the second part on the business of said Railroad Company between points on said road where said Telegraph Company may have stations, giving precedence to messages relating to the movement of trains, over any commercial or paid messages so far as the Statutes of the State, or the United States, may allow such precedence.

Sixth. To furnish such principal Officers and Agents of the party of the second part, as may be designated by application in writing of the General Superintendent of said Railroad Company, with annual franks or passes, entitling them to send messages free, over all the lines of the party of the first part, provided, however, that said party of the first part shall be entitled to charge up, and keep account of, all such messages transmitted to or from any point off the line of said road of the party of the second part, at its usual rates for the transmission of commercial messages and for all of such account above the amount of Two hundred dollars (\$200.00) in any one month, said party of the second part shall pay one half thereof, being half rates for all the business done over the lines of the said party of the first part above the said sum of Two hundred dollars (\$200.00) per month, or in any one month.

And the party of the second part in consideration of, and agreeing to, all the foregoing, further covenants:

First. That the party of the first part shall have perpetual right of way, to erect and maintain Telegraph lines along said Railroad, of as many wires as it may deem necessary to its business, and additional lines of poles, whenever the said party of the first part shall so elect, and the exclusive right of way so far as the said party of the second part has the power to grant or secure the same, and said party of the second part if it has the right and power to refuse, will not transport poles, wires or other material for any other Telegraph Company at less than full rates for freight thereon, nor distribute or unload the same at other than the regular Railroad Stations on said road; and should a competing line of telegraph be established along said Railroad, then the party of the first part shall be released from its stipulation to transmit, free of charge, any business of said Railroad Company, off or beyond its line of road.

Second. To transport for said party of the first part, free of charge, all poles, wire and other material required by said party of the first part for the construction, reconstruction, repairs or maintenance and operation of its lines, and distribute at the places required, such poles, wire and other heavy material as may be needed, along the line of said Railroad, either in the construction of additional lines, or in the repair of the same and of existing lines.

Third. To transport in any of its passenger trains the officers and agents of the party of the first part, and put them off at any station of said road, or at any discovered break of the telegraph wires; such

officers or agents presenting franks or passes, which shall be supplied at any Ticket Office of said party of the second part, on application of the Superintendent of the party of the first part.

Fourth. To maintain all such telegraph stations as may be opened by, or for the use and benefit of said Railroad Company, at the exclusive cost of the party of the second part; to appoint its own operators thereat; but to retain no operator who refuses, or persistently neglects, to obey the rules and regulations of said party of the first part.

Fifth. To receive for transmission, and send over the wires and deliver to address at the Railroad Telegraph Offices in towns or at stations where the party of the first part may have no offices, all commercial or other messages paid or to be collected, that may be offered, under the rules of said party of the first part, and make monthly reports thereof, and pay over monthly to said party of the [fol. 793] first part, all the tolls collected thereon, and to cause the operators and agents of said party of the second part to observe all the rules and regulations of the party of the first part, with respect to the monthly reports of business and payment of all receipts thereon; and the regular rates of tolls shall accrue to the party of the first part on any and all business received at, or transmitted from, the telegraph stations of the party of the second part, except the legitimate Railroad messages of the said party of the second part.

Sixth. To pay to said party of the first part the cost of constructing the wire herein designated and set apart to the exclusive use of said party of the second part, and the cost of equipping the same at the Railroad Stations not already supplied with instruments, batteries and other necessary fixtures, as soon as the cost thereof can be ascertained.

In witness whereof, the parties hereto have by their proper officers and under their corporate seals duly executed this Agreement this eighteenth day of August 1870.

The Western Union Telegraph Company, by Willm. Orton,  
President. Attest: George Walker, Secy. pro Tem.  
(Seal.) The Western Atlantic Railroad, by Foster Blodgett, Supt. W. A. R. R.

Approved. Rufus B. Bullock, Governor.

By the Governor. H. C. Corson, Secy. Ex. Dept. (Seal.)

UNITED STATES OF AMERICA,  
Northern District of Georgia:

To the Judge of the District Court of the United States for the Northern District of Georgia:

The Western Union Telegraph Company, a corporation created by the State of New York, and having its principal office and place of business at the City of New York in that State, and being therefore a citizen of the said State of New York, brings this its bill against the Western and Atlantic Rail Road Company, a body corporate created by the State of Georgia having its principal office and place of business at Atlanta in the Northern District aforesaid, and being therefore a citizen of the State of Georgia.

And thereupon, your orator complains and says:

On or about the eighteenth day of August in the year One Thousand Eight Hundred and Seventy, your Orator being engaged in the business of telegraphing, and owning a line of magnetic telegraph extending from Atlanta in the State of Georgia, to Chattanooga in the State of Tennessee, entered into a written contract with the then superintendent of the Western and Atlantic Railroad of the State of Georgia, with the approval of his Excellency the then Governor of said State, a copy of which contract is hereto annexed as a part of this bill, marked Exhibit A.

The first stipulation in said contract was that your Orator should set apart on its line of poles along said Railroad a telegraph wire for the Exclusive use of said Western & Atlantic Rail Road. This stipulation your Orator at once complied with. The second stipulation was for equipping said line of wire with the requisite instruments, batteries and other necessary fixtures, and putting the same in complete working order. This, also, your Orator complied with. The third stipulation was for running said wire into all the offices of said Railroad along the line. This, also, was complied with, so far as the said Superintendent wished or required. The fourth stipulation, relating to the setting apart said wire, and allowing certain messages [fol. 795] to be transmitted free of charge has, also, been complied with. The fifth stipulation relating to free transportation over other wires of your Orator, when the wire specially set apart should be out of order, has also been complied with; or at all events, there has been no violation of the same. And the sixth stipulation, as to franks or passes, has been complied with by your Orator, in every respect, up to, and until long since, the open disavowal by the defendant of any binding force as against said defendant in said contract.

Certain stipulations casting duties and devolving obligations upon said Western & Atlantic Rail Road are also found in said contract after the foregoing six, among which attention is called particularly to the second, third and fifth. The second requires the Rail Road to transport free of charge for your Orator poles, wire and other material, and to distribute the same where wanted. The third re-

quires the said Rail Road to supply certain franks and passes to the officers and agents of your Orator, and to transport thereupon the production of such franks and passes, in any of the passenger trains of said Rail Road, and put them off at any station, or at any discovered break of the telegraph. The fifth requires said Rail Road to receive for transmission and send over the wire and deliver to address at the Railroad Telegraph offices, in town, or at stations where your Orator may have no offices, all commercial or other messages, paid or unpaid, offered under the rules of your Orator, and make monthly reports thereof and pay over monthly to your orator all the tolls collected thereon, and to cause the operators and agents of said Rail Road to observe all the rules and regulations of your Orator with respect to the monthly reports of business and payment of all receipts thereon.

Special attention is, also, called to that part of the sixth stipulation above referred to, which declares that your Orator shall be entitled to charge up and keep account of all such messages transmitted by said Railroad to or from any point off the line of said Road, and to collect therefor one half the usual rates on all such business after deducting the sum of two hundred dollars in each month.

[fol. 796] The said contract was observed and complied with by the said Rail Road, so long as the said Road remained in the hands or under the immediate control of the State of Georgia; in whom was and still is the ownership of the said Railroad; and the recital in the said contract to the effect that said Railroad was a corporation at the date of said contract is an error and was introduced by mistake of the draftsman.

In pursuance of a statute of the State of Georgia, the said Rail Road was on or about the twenty fifth day of December in the year 1870 leased, (whilst the contract aforesaid was in full force) to certain persons for the term of twenty years, and said lessees became by operation of said statute a body corporate and publicly the name of the Western and Atlantic Railroad Company, which Company is the defendant in this bill.

The said defendant, by virtue of said lease, on or about the twenty seventh day of December, 1870, entered into possession of said Rail Road with all its rights and privileges, including the right to use the aforesaid wire and the instruments, batteries and other necessary fixtures with which the same had been equipped by your Orator. And the said defendant, with your Orator's approbation, commenced the use of said wire, instruments, batteries and other fixtures; and has, from about the day and year last aforesaid up to the present time had the free full and exclusive use of the same, with no exception but as may be hereinafter stated. The said defendant has taken and received all the benefits of said contract, until very recently as fully as they were enjoyed by the said Rail Road or by the State prior to the execution of said lease; and it is by virtue of said contract, and that alone, that the said defendant had any valid right or claim to said benefits; the said defendant coming in for the same under the State or under the Western and Atlantic Rail Road, and



having all the rights and privileges of its predecessor, and not being possessed by virtue of any new agreement or contract with your orator of any other or different rights and privileges whatsoever. Your orator was willing and is still willing for the said defendant to occupy in every respect the place of its lessor in the said contract. [fol. 797] In the belief and with the expectation (on the part of your Orator's officers) that the said defendant, whilst taking the benefits of said contract, would, or should, also submit to its burdens, your Orator continued to grant the same advantages to the defendant after the lease that had been accorded to the State or the said Rail Road before, and was careful to comply with and abide by said contract in all its terms. Acting in this spirit and with these views, your Orator not only permitted the said defendant to retain and use said wire with its equipments of every kind, but did a large amount of telegraphing for said defendant under the sixth stipulation above referred to, without charge, and the defendant accepted the said service and took the benefit thereof. And in further execution of said sixth stipulation your Orator, between the date of said lease and the first day of September last past, did for said defendant telegraphing chargeable at half rates according to said stipulation, to the amount (after deducting the two hundred dollars in the month) of about two hundred and ninety four dollars and ninety eight cents, which amount has been demanded of the said defendant, and which it wholly refused to pay, basing the refusal on a total denial of the binding force of said contract as against the defendant, and on the further alleged fact that similar exactions are not made of other Rail Road Companies whose lines connect at Atlanta.

After making several prior demands for said amount or portions thereof, and being refused payment, your Orator made a last and final demand for the same on or about the first of October last past, and being again refused, and it being apparent that said defendant recognized no liability whatever for said account, or for similar items based on service under said contract, and indeed that said defendant wholly repudiated and disowned any obligation on its part to abide by or perform the terms of said contract, and more especially that it would not and did not intend to settle for future work (any more than for past work) on the basis of the contract, your Orator, through the proper officer, issued an order on the third day of February, 1872, to discontinue such work to and from stations off of defendant's Rail Road, except on receipt of regular [fol. 798] rates. This order was right and altogether justifiable. It was not made until after the defendant had broken the contract by repeated refusals to comply, nor until after reliable information that defendant professed to owe no allegiance to the contract. Nor when made, was it extended beyond the precise subject matter of the breach. Defendant would not pay on the basis of the contract for a certain class of work; therefore, your Orator stopped doing that class of work unless the defendant would pay for it on the same basis with the public at large. But your Orator left the contract to operate in every other particular if the defendant would have abided by it; but such was not the defendant's pleasure.

On the fifth day of February 1872, the said defendant, by its President, Joseph E. Brown, issued an order which is still in force, denying to your Orator the transmission of any message through the defendant's telegraphic agents; denying, also, to your orator the privilege of having any office or agent in any depot of the said defendant; directing that all tickets that has been issued to your Orator's officers or agents be taken up, and that your Orator's officers, Agents and employees be charged full fare for passing over the defendant's road, and that none of them be permitted to pass on freight trains; directing, also, that no telegraph material of any character be transported over said Road for less than full rates of freight, nor in any case be delivered at any point other than a regular depot; and opening to the public the use of the said wire under the defendant's care and control, both for the extreme points of Atlanta and Chattanooga and the intermediate stations, with directions to collect customary rates for the same and pay the money into defendant's treasury.

This order is flagrantly violative of both letter and spirit of the aforesaid contract, and the defendant has put and now continues the same in force to drive your orator into an abandonment of said contract and in the hope of dictating to your Orator conditions less onerous to the defendant and less advantageous to your Orator. The said order even goes to the length of setting up by means of the wire set apart for the exclusive use of said Rail Road, a rival business [fol. 799] ness to compete with your Orator in your Orator's regular calling, in as much as your Orator has offices, and had at the date of said contract, at Atlanta, Chattanooga, Dalton and Kingston, and had, and still has, as against the defendant, the exclusive right to send and receive telegraphic messages at those points sent by the public and intended to pass up or down the line of telegraph erected along defendant's Road. Your Orator not only complains of this encroachment on its rights, and business as being a breach of contract by defendant, but as being the exercise of an assumed power not conferred by defendant's charter. The defendant is a rail Road Company, and has no right to engage in telegraphing for the public.

Your orator charges that in the execution of said order, the said defendant by its operators, agents and employees has carried on the business of telegraphing for the public, charging and collecting compensation therefor and retaining the money, but to what extent, and what the proceeds amount to, this complainant cannot allege.

The defendant, as already shown, denies that said contract has any binding force upon it, and acting upon that theory, it refuses to pay your orator for telegraphing at contract rates; it withdraws all free tickets and requires full fare from your Orator's officers, agents, and employees; it ceases to carry telegraph material of any kind for your orator free, and charges therefor rates; it ceases to distribute said material where needed, but restricts delivery to regular stations; it refuses to transmit for your Orator any dispatches; it enters into competition with your Orator for the general business

of the public, and it no longer pays to your Orator its collections for dispatches, but draws them into its own treasury.

These considerations induced your Orator to treat as revoked and withdrawn all power and privilege on the part of the defendant to use said wire or the batteries, instruments and fixtures therewith connected, and all authority to send or receive messages by means of the same, or to collect or receive compensation therefor, and accordingly your Orator has sought to resume full possession and exclusive [fol. 800] control of said wire, but has been hindered and obstructed by said defendant in so doing. On the ninth day of February 1872, the said defendant, by its agent at Dalton, George C. Conner, gave notice to one of your Orator's agents that an attempt to cut said wire out of defendant's office would be resisted with force; and your Orator charges that it is the design and purpose of the defendant's officers and agents to make forcible resistance to any and every such attempt at Marietta, Atlanta, Acworth, Cartersville, Kingston, Calhoun and Dalton and Ringgold, at each of which points the said wire passes from the telegraph poles of your Orator into the depot or office of defendant.

As matters now stand, the said defendant has no just claim in law or equity to the use or control of said wire; on the contrary, as will be seen by reference to said contract, the said wire is and ever has been the property of your Orator with a mere right to its use granted out by contract, which contract is by the defendant set at defiance. It is of the value of Six Thousand Dollars and rests throughout its whole length on the poles of this complainant, and defendant's possession of it is only at the points above stated, where it is connected with instruments situated in defendant's depots or offices. Said possession, such as it is, is within the control of a court of Equity by the Writ of injunction, but is of a nature not to be the subject matter of an action at law, or if so at all, not with full and adequate redress to your Orator's rights in the premises. Said wire is about one hundred and thirty eight miles long, and defendant has much less than one mile of it in actual possession, the rest being, as above stated, suspended upon the poles of this complainant, along with other wires in the exclusive control and use of complainant, but complainant can make no effectual use of said wire without separating it from defendant's offices.

The free and unobstructed use of said wire would be of great value to your Orator, but such is the nature of the property that such value cannot be estimated. It would undoubtedly yield a large income [fol. 801] come in tolls, and your orator ought to have an opportunity of using it to the best advantage, and securing the income, and keeping an accurate account of the same, all of which your Orator is prevented from doing by the said defendant. The damages thus caused to your Orator by the said defendant are heavy, amounting to at least twenty five hundred dollars, but from their nature cannot be accurately estimated beforehand or compensated by action at law. The said defendant certainly has no right to withhold said wire or any part thereof from your Orator for the purpose of telegraphing for the public, and there is almost as little right to with-

hold it for any other purpose, seeing that the defendant has thrown off all the burdens of said contract. Nor could your Orator without an indefinite multiplicity of suits obtain redress at law for the breaches of contract committed by the defendant as aforesaid, even if the contract had been expressly adopted by the defendant as its own. The officers, agents and employees of your Orator have or may have frequent occasion to pass over defendant's Road; and to bring an action to recover back each payment of fare would be attended with great trouble and expense. So would it be to sue for and recover back freight paid on poles and other telegraph material. So would it be to proceed for damages for refusing to distribute such material. So would it be to sue for and recover damages for an unauthorized use of said wire, or for the refusal to use it according to the contract, seeing that the instances falling under the general refusals on these heads are likely to be numerous and of very frequent recurrence.

The only full, complete and adequate redress for your Orator, therefore, is to obtain the undivided possession and use of said wire, with the instruments and fixtures connected therewith. This as it is understood, has been accomplished at Chattanooga, but at all the other stations above enumerated, the said defendant has that kind of possession which has been hereinbefore explained, and will, as your Orator charges, interpose force to obstruct your Orator in any unaided effort to sever said wire from said offices, or to resume possession of said instruments and batteries; and will, also, unless prevented, continue to use said wire for both individual and public service and to receive and appropriate the income therefrom.

Your Orator is willing and hereby offers to do full and complete equity towards the said defendant touching all the premises.

To the end therefore that the said defendant, its officers, agents, servants and employees may be restrained from using said wire for any purpose whatsoever, and from receiving the earnings and income thereof; and may also be restrained from hindering, obstructing or molesting your Orator in the use thereof, or in severing said wire from each and all the offices or depots of said defendant with which it is connected. May it please your Honor to grant the United States Writ of injunction accordingly directed to the said defendant, and all its officers, agents, servants and employees, giving them such command under an appropriate penalty:

That the Writ of Subpœna may also be issued, directed to the said Western and Atlantic Rail Road Company, requiring it to be and appear at the next April Rules to make answer to all and singular the foregoing; and that your Orator may have such other and further relief as the nature of the case requires.

L. E. Bleckley, Sol. Pro. Complt.

Following this bill is a verification thereof by its General Superintendent.

Exhibit "A" attached to the bill being the agreement between the Western Union Telegraph Company and the State of Georgia, signed by Rufus B. Bullock for the State of Georgia under date of

August 18, 1870, is the same agreement as is hereinabove attached to this motion as Exhibit —.

---

[fol. 803] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF GEORGIA

THE WESTERN UNION TELEGRAPH COMPANY

VS.

THE WESTERN & ATLANTIC RAILROAD COMPANY

ANSWER

Respondent makes the usual reservations for answer says: Respondent admits that complainant made with Foster Blodgett former Superintendent of the Western and Atlantic Railroad the contract set up in Complainant's Bill, and that a correct copy of said contract is attached to said bill as an exhibit, but this respondent was not a party to said contract as will appear by reference thereto, has never agreed to its terms, and has never in any wise accepted the same, and cannot be bound by any of its terms or conditions. This Respondent had no existence as a corporation when said contract was made and did not become a corporation until the Western and Atlantic Rail Road was leased to Respondents on the twenty-seventh day of December, A. D. Eighteen Hundred and Seventy.

By the Fourth Section of the Act approved on the twenty fourth day of October, A. D. Eighteen Hundred and Seventy, under which the lease of said road to Respondents was made, it is declared that Respondent shall have the power to sue and be sued, on all contracts made by Respondent in any County through which said Road runs, after the execution of said lease, or for any cause of action which accrued to Respondent or to which Respondent became liable after said lease was executed; and by the eighth section of the same Act provision was made for paying all outstanding or floating debts or liabilities of the State of Georgia on account of the said Western and Atlantic Rail Road. Respondent submits that under the provisions aforesaid this Respondent is in no way bound by any contract in existence before the making of the lease, a copy of which is hereto attached marked Exhibit "A."

Respondent denies that it received the wire, instruments, batteries and other fixtures described in Complainant's Bill under any contract with Complainant, and denies ever having used the same under any [fol. 804] such contract, and denies ever having done any act that was intended to be, or that could fairly be construed to be an acceptance of said contract, or of any of its terms or stipulations, on the contrary Respondent had no knowledge of the existence of any such contract, or of any contract at all between the Complainant and the State of Georgia in regard to said wire, instruments, batteries and fixtures until long after the same had been delivered to respondent as

an appurtenance of the Road under the lease aforesaid, and when the Road and its appurtenances were turned over to Respondent by Foster Blodgett, former Superintendent, the said Blodgett called the attention of Joseph E. Brown, President of Respondents to said wire, instruments, batteries and fixtures as one of the equipments or appurtenances of said road, which belonged to Respondent under the terms of the lease; and said Blodgett stated to said Brown, that the State of Georgia had purchased and fully paid for the same; and the same was delivered by the said Blodgett then and there; into the possession of Respondent and from that time henceforth was used by Respondent as all other property of said road was without any reference to any contract which the State may have previously made with parties for the purchase or use of the same, and said wire, instruments, batteries, etc., were invoiced to Respondent by the Commissioners appointed to make out a schedule of said Road and its appurtenances, and Respondent stands charged and is responsible on its bond to the State for the same, as appears by reference to a part of said inventory hereto attached, marked Exhibit "B." Sometime thereafter Joseph E. Brown, President, as aforesaid, incidentally heard of the existence of a contract between Complainant and Foster Blodgett, as former Superintendent, and as soon as convenient thereafter procured a copy of the same, this was the first information Respondent had of the existence of said contract, and said Brown as President, without unnecessary delay notified William Orton, the President of Complainant, that Respondent was not a party to said contract and would not be bound by it, and said Brown offered to [fol. 805] make a contract similar to that made by Complainant with other connecting roads of Respondent's Road, which said notice was received by said Orton, and said proposition was considered and rejected. A copy of said Brown's letter is hereto attached, marked Exhibit "C." It is true that after the notice aforesaid was given, the officers and agents of Complainants were permitted to pass over the Road of Respondent free of charge and on many occasions complainant was accommodated in the receipt and delivery of telegraph materials. But no privilege, or accommodation was conceded to complainant as a matter of right. The officers and agents of Respondent were enjoying courtesies extended by complainant such as are usual or would be proper, if no contract had ever existed and this Respondent, having given complainant the notice aforesaid, it would be a gross perversion of acts of pure civility to construe them into acceptance of an oppressive contract distinctly and emphatically repudiated by Respondent.

Respondent avers that the statement made by the said Blodgett to said Brown concerning the purchase of said wires, instruments batteries, etc., by the State was true and as evidence of the matter of said statement Respondent attaches hereto marked Exhibit "D," a copy of the Bills presented by complainant to the authority of the State and audited and paid out of the Treasury of the State as a liquidated demand against the State under section eight of said Act, approved on the twenty-fourth day of October eighteen hundred and seventy authorizing the said lease to Respondent together with a copy



of the receipt of complainant for the amount of said bills. It appears by said receipt that complainant on the twentieth day of January A. D. eighteen hundred and seventy-one, being after the date of the lease received out of the State Treasury the sum of six thousand two hundred and sixteen dollars and nineteen cents in full payment for said wire, instruments, batteries, etc., Respondent is advised and believes it to be true that said wire, instruments, batteries and fixtures were in the exclusive possession and use of the Western and Atlantic Rail Road while said Road was in the possession of the State and [fol. 806] under the management from the time the same was completed and set apart to the exclusive use of said Road and Respondent positively avers that said wire instruments and batteries, etc., have been in the exclusive possession of respondent since the lease until Respondent was dispossessed of a portion thereof in the State of Tennessee by judicial proceedings entirely ex parte, and in which Respondent as yet has had no hearing. In view of the facts aforesaid, Respondent submits to the Court whether it is not true, that said wires, instruments, batteries, etc., are the property of the State of Georgia absolutely and as such included in Respondents' lease from the State, and if this is not true, whether Respondent under the lease is not entitled, at least to the exclusive use and possession of the same as against complainant, and Respondent insists respectfully that complainant must seek redress from the State and not from this Respondent for any damage or other liability growing out of said contract of Complainant with Foster Blodgett as Superintendent, etc.

Respondent admits that orders were issued on the part of Respondent and Complainant substantially as stated in Complainant's Bill, and Respondent also admits that any effort on the part of Complainant to take possession of said wire, instruments, batteries, etc., without due process of law, would be resisted by Respondent with such force as Respondent is advised would be proper in the protection of Respondent's property.

In any view of the facts aforesaid, Respondent respectfully insists that Complainant is not entitled to the possession of the wire, instruments, batteries, etc., and to the money received from the State in payment of the same. If Respondent is not entitled to the possession and use of said wire, instruments, etc., then Respondent submits, that it is entitled to said money and that no injunction ought to be granted until after said money has been paid over to Respondent to be used in the erection of another wire. Respondent avers that said money has neither been paid over nor tendered. Respondent believes and charges that it is Complainant's intention to keep the [fol. 807] money and to recover the wire, instruments, batteries, etc., also, which Respondent submits would be allowing Complainant to treat the contract it had with the State as received without having given up the fruits of said contract. Inasmuch as Respondent received said wire, with its appurtenances from the State and has been charged with it on the inventory, and is held on its bond to return the same or pay the value thereof, at the expiration of the lease. Respondent has as against the State the right either to the use of the



wire or the money paid therefor in its stead; and Respondent insists that it has the same right against the complainant. Respondent avers that the interest upon the money received by the complainant from the State is more than sufficient to pay any just demand which Complainant has against Respondent for telegraphing beyond the terminal point of the Road, and Respondent further says that the accommodations furnished by Respondent to Complainant in hauling freight and transporting its agents and workmen would justly bring Complainant in debt to Respondent.

Respondent denies that any of the facts or allegations in Complainant's bill are sufficient to require the Court to grant the injunction prayed for in Complainant's Bill. Respondent insists that there can be no right to Complainant to recover back money paid for freight and fare, nor to sue for failure to receive and deliver freights at points other than Respondent's stations under a contract which was never binding upon Respondent, and which if it ever was binding, Complainant has treated as re-cinded; the value of the wire, instruments, batteries, etc., can be clearly ascertained as appears by Complainant's Bill by the same as shown in Exhibit "D," Respondent further denies that Complainant has any right to come into a Court of Equity in this case to prevent a multiplicity of suits at law. In case the contract has been violated by the State as Complainant treats it as re-cinded on that account, Complainant would be entitled to recover its full damage, if any, but the entire breach of the contract in a single action against the state. The use of the wire, instruments, batteries, etc., is not necessary to Complainant's business; and Complainant does not aver that any injury to the property is apprehended, and that Respondent would not be able to make good any injury to the same in damages. Respondent is advised that Complainant is a foreign corporation and exists in this State only by comity and that complainant has no exclusive privileges—no right to object to Respondent or any one else owning a telegraph wire, and sending dispatches either for public or private accommodations—and that Complainant has not even the right to occupy any portion of the right of way which has been closed to Respondent, as aforesaid. The use of the wire, instruments, batteries, etc., is absolutely necessary to the safe and successful running of Respondent's road, without these collisions would be likely to occur between trains and the lives of travelers, as well as the property of Respondent would be greatly damaged.

And having fully answered respondent prays hence to be dismissed with his reasonable costs in this behalf most unreasonably expended.

B. H. Hill & Sons, Pope & Brown, Respondent's Attorneys.

This answer is verified by Jos. E. Brown, President.

Exhibit "A" attached to above answer being the lease of the Western & Atlantic Railroad by the State of Georgia to the Western & Atlantic Railroad, dated December 27th 1870, is the lease copy of which is hereinabove attached to this answer as Exhibit —.

## EXHIBIT "C" TO ANSWER

Western &amp; Atlantic Railroad Co., President's Office

Atlanta, Ga., March 18, 1871.

Hon. Wm. Orton, Presdt. Western Union Tel. Co., N. Y.

DEAR SIR: Within the last few days my attention has been called to a contract made between you and Foster Blodgett, former Superintendent of the W. & A. R. R. of this State, in reference to the Road's [fol. 809] telegraphic business along your line. The contract purports to have been made by the W. & A. R. R. Co. No such company existed in law or in fact at that time. The W. & A. R. R. was built by the State of Georgia and was her property. No private person or corporation owned a dollar of stock in the road & it had never been incorporated by the name of the W. & A. R. R. Co.; or by any other name, but was simply the property of the state, & was called the "Western & Atlantic Railroad." Since the date of the contract above referred to, the legislature of the State passed a law, authorizing the Governor to lease the road to a company to be incorporated for that purpose, to be called the "Western & Atlantic Railroad Company." On the 27th day of December last, the Company was incorporated accordingly & the road with all its houses, rolling stock & appurtenances of every character, was leased to the new Company.

Provision is made in the act authorizing the lease, for the State to make good any damages & pay any debts that may have accrued to or may be due any one on account of the road during the time the State has owned, controlled & managed it & the new Company is not to be cumbered with those matters. It simply pays the monthly rental agreed upon & has the clear use of the road. In this State of the case, as President of the W. & A. R. R. Co., I feel it my duty to notify you that the company does not hold itself bound by the stipulations of the contract above referred to, as, for instance, that it will in case of any other company being chartered along the line, refuse to deliver to that Company poles at the points between the depots, or that it will bind itself to deliver poles for you at points other than depots, or the like. In a word, this Company does not consider itself a party to that contract.

The reason why we are not willing to adopt the contract by which we are not bound, or why we would not make such a contract as that made by Mr. Blodgett, is that we find we would be subject to burdens under it which you do not impose upon connecting roads. One of the stipulations of that contract as it is now shown to me, is that all [fol. 810] messages sent beyond the terminal points of this Road on the business of the road, are to be noted & an account kept, & in case our business exceeds \$200 a month, we are to be charged half price upon the excess. This I learn is not the case with the connecting roads at either end, but they have, without any such limit, the right to send all messages necessary in the transaction of their legitimate business. If you will extend to us the same privilege that the other connecting roads enjoy in this respect, we would be willing to enter

into a contract with you, similar in other respects to that heretofore made by Supt. Blodgett, but with that provision in the contract we will not adopt it nor hold ourselves bound by it. We shall, however claim the right to our wire heretofore paid for by the State, as it is one of the appurtenances of the road that has been leased to us by the State. We would be pleased to enter into a contract with you similar to the contract of connecting roads if agreeable to you. I am  
 Very respectfully, Your Obt. Svt., Joseph E. Brown, President.

[fol. 811]

## EXHIBIT "D" TO ANSWER

Southern Division

Completion of Work

No. of Estimate, 186

Construction from Atlanta, Ga. to Chattanooga, Tenn., on Western  
 & Atlantic Railway, 140 Miles

## Materials Used

Poles .....	
4,100 Insulators, Bracket Pattern, at 18¢ .....	738.00
140 miles of No. 9 oiled wire, — lbs. at — .....	3,767.50
— feet of Cable Conductor, — at — .....	
— Cross Arms at — .....	
— Bolts and Washers at — .....	
300 Lbs. of Spikes at 8¢ .....	24.00
— Nails at — .....	
— Rings at — .....	
	<hr/>
Labor and incidental Expenses .....	\$4,529.50
	1,448.94
	<hr/>
Amount of Estimate .....	5,978.44
	6,000.00
	<hr/>
	\$21.56

Correct. J. C. Courtney, Supt. Telegraph.

Remarks by the Gen'l. Sup't. —.

Approved. Foster Blodgett, Supt.

Dated — —, 186—.

— —, Gen'l Sup't. Southern Division.

On the back of exhibit:

Atlanta, Ga., December 1st, 1870.

The Western & Atlantic Railroad to the Western Union Telegraph Co., Dr.  
1870.

Dec. 1. To Registers, Relays, Keys, Switches, Arrestors,  
Wire &c. furnished Offices at Adairsville, Ga.  
Tilton, Ga. and Chickamauga Tenn. as per bill  
rendered ..... \$237.75

Correct. J. C. Courtney, Supt. Telegraph, W. & A. R. R.  
Approved. Foster Blodgett, Supt.

[fol. 812] Received, Atlanta Jany. 20th, 1871, His Excellency the Governor, Draft upon the State Treasurer, dated the 20th Jany., 1871, in my favor for Six Thousand Two Hundred and Sixteen 19/100 Dollars, it being for a liquidated claim against the W. & A. R. R. in favor of the Western Union Telegraph Co. and chargeable to 8 Sec. Act 24th Oct. 1870 to lease W. & A. R. Road.

The Western Union Telegraph Co., per C. G. Meriwether,  
Dist. Supt.

Executive Department,  
Atlanta, Georgia, Feby. 19, 1872.

I hereby certify that the above is a true copy from the account on file in this office.

P. W. Alexander, Secty. Ex. Dept. (Seal Executive Department, Georgia.)

UNITED STATES OF AMERICA,  
Northern District of Georgia:

#### CROSS-BILL

To the Judge of the United States District Court for the Northern District of Georgia:

The Western and Atlantic Rail Road Company, a corporation organized under the laws of the State of Georgia, brings this its Bill against the Western Union Telegraph Company a corporation organized under the laws of New York, and thereupon your orator complains and says that the Western and Atlantic Rail Road Company became incorporated on the twenty-seventh day of December A. D., Eighteen Hundred and Seventy; that being the day on which your orator became the lessee of the Western and Atlantic Rail Road, under the terms of an Act approved on the twenty-seventh day of October, Eighteen Hundred and Seventy. By the Fourth Section

of said Act it was provided, that upon the acceptance of the proposition of persons seeking to become lessees of the Western & Atlantic [fol. 813] Rail Road, and the recording of said acceptance as in said Section provided, said persons should become a body corporate and politic for the term of twenty years under the name and style of the Western & Atlantic Rail Road Company; and as such should have power to sue and be sued on all contracts made by said company in any county through which the Road runs, after the execution of said lease, or for any cause of action which may accrue to said company or to which it may become liable, after said lease was executed. By the eighth Section of said Act provision was made by the liquidation and payment of all debts or liabilities of the Western and Atlantic Rail Road existing up to the twenty-seventh day of December A. D., Eighteen Hundred and Seventy, at which time your orator became the lessee of said Road and its appurtenances for the full term of twenty years from that date. By said Act, and the deed of Lease made in pursuance thereof to your orator, a copy of said lease is hereunto attached, marked Exhibit "A". Your orator became entitled to have and to hold as lessees the Western and Atlantic Rail Road together with all of its houses, workshops, depots, rolling stock, track, right of way, and every other appurtenance of said Road freely and completely without let or hindrance for the full term of said lease and possession of the same was accordingly on twenty-seventh day of December A. D., Eighteen Hundred and Seventy, delivered to your orator. Orator is not bound to perform any contract, make good any default or answer for any cost of the State of Georgia, or the officers or agents of said Road, before said lease was made, but is responsible for its own contracts or costs only.

There was invoiced to your orator and turned over with said Road, as one of the appurtenances thereof, a telegraphic wire running on the right of way of said road from Atlanta, Georgia, to Chattanooga, Tennessee, together with instruments, batteries, and other fixtures, all of which had been constructed under contract, & had been delivered to and fully paid for by the State of Georgia, while said Road was under the management and control of said State. Orator be- [fol. 814] came responsible by bond to return to the State of Georgia at the expiration of said lease, the said wire with its equipment as well as the Road and all other appurtenances thereof.

Upon coming into possession of said Road and its appurtenances under said lease, orator found upon the right of way from Atlanta to Chattanooga, a line of poles with telegraphic wires and fixtures, all of which were claimed by the defendant, and with the exception of the one wire already described as leased to your orator, were being used and operated by defendant by the transmission of dispatch for the public. Orator permitted said defendant to keep and use said property on said right of way temporarily in the hope that some contract might be made between orator and defendant by which defendant by a proper consideration might be permitted to remain on said right of way of said Road and use said property there during the lease; but orator soon discovered that defendant pretended

to have a right to remain on said right of way and use said wires &c. without the permission of your orator. Defendant claimed to have had a contract with Foster Blodgett, Superintendent of the Western and Atlantic Railroad before said lease to your orator, under which contract it pretends that it has a right to continue on the right of way of said Road, with its poles and wires &c. and even went so far as to claim that it had a right to the wire which had been delivered to your orator as an appurtenance to said Road under the terms of the lease. Defendant undertook to take said wire out of Orator's possession, and when it discovered that it would not be permitted to do that without resistance, it commenced various ex parte legal proceedings, in the State of Tennessee, of which orator had no previous notice, by means whereof orator was wrongfully deprived of the possession and use of a portion of the wire included in the lease aforesaid and the instrument with which to operate the same, also included in said lease, and your orator further shows that by such illegal seizure and interference the said defendant has rendered your orator unable to keep up telegraphic communication along said Road, and at the stations and between the terminal points thereof, as to the move- [fol. 815] ments and running of the trains of your orator on said Road, thereby producing constant danger of collisions destructive to the trains, cars and engines of your orator, and hazarding greatly the lives of the offices & employees of said company passing upon said trains, and the passengers travelling upon said Road, and has compelled your orator to resort to other means much less safe in their character to avoid dangers in conducting its business over that portion of the Road lying in the State of Tennessee. And your orator further avers that if said telegraphic communication is not forthwith restored by the order of your Honor, your orator apprehends irreparable damage resulting from collision caused by the interruption of said telegraphic communication. And in addition to said ex parte proceedings in the State of Tennessee, defendant has filed and has now pending in this Honorable Court on the equity-side thereof, a bill denying all right of your orator to use said wire, and its equipment, claiming the right to resume possession of the same, and praying by an injunction to restrain your orator entirely from its use, and from intervening to prevent defendant from taking entire and exclusive possession and control thereof. Attached to said Bill is copy of a contract which defendant claims to have made with Foster Blodgett, former Superintendent of said Road, which contract orator submits was terminated by the lease aforesaid, and if it was not so terminated has been entirely broken and re-cinded by the defendant, as appears by its actings and doings aforesaid, and by the allegations and prayer of defendant's said bill. Orator avers that defendant had no right to occupy any portion of said right of way except under the contract terminated and re-cinded, as aforesaid. Orator alleges that defendant has continued temporarily upon the right of way of said Road, by sufference only, and now since orator is unwilling for defendant to remain thereon any longer defendant is an intruder and ought to be ejected therefrom. This Honorable Court having ob-

tained complete jurisdiction of the whole subject matter by the filing of defendant's Bill as aforesaid your orator prays that until a [fol. 816] final hearing said defendant be enjoined from going upon the right of way of your orator, and also from using the wires along said right of way *by* the purpose of telegraphing, or for any other purpose, and that defendant be further enjoined from interfering with the use of the wire and all its appurtenances extending from Atlanta to Chattanooga along said Railroad and upon its Right of way so purchased and paid for by the State, and so granted, leased and delivered by the State of Georgia to your orator, and that defendant be compelled to restore to your orator that portion of the wire, instruments, batteries and fixtures being within the State of Tennessee, and that on the final hearing defendant be perpetually enjoined, and that defendant be decreed and compelled to pay to your orator such damages for interference with and destruction of the rights of your orator *or* may seem to your Honor to be equitable and just, and that defendant may be declared to be an intruder on said right of way, and may be by decree ejected therefrom, and that such other and further relief may be granted as the nature of the case may require.

Complainant also prays for subpœna.

B. H. Hill & Sons, Pope & Brown, Comp't's Sols.

The foregoing cross bill is verified by Joseph E. Brown, President of the Western & Atlantic Railroad.

Exhibit A, which is lease by the Western & Atlantic Railroad by the State of Georgia, dated December 27, 1870, hereinabove referred to and identified.

---

#### ORDER DENYING INJUNCTION

[Title omitted]

The Motion for an injunction in this cause came on to be heard before me at Chambers, & was argued by counsel.

[fol. 817] I am of the opinion in the absence of proofs to overcome defendant's answer and the affidavit of Courtney, that the wire & equipments in question are the property of the State of Georgia, & as such are included in the lease executed by the said State to the defendant. And further: that the contract made between the Superintendent of the Western & Atlantic Railroad & the Complainant, prior to the making of the lease to defendant, is not binding upon defendant unless adopted by defendant, & as defendant has denied that it has adopted or acted upon the contract set forth by complainant, it is, therefore, my opinion that the injunction ought to be denied, & it is so ordered.

Atlanta, Ga., March 11th, 1872.

John Erskine, U. S. Judge.



## DEMURRER TO CROSS-BILL—DEMURRER SUSTAINED

[Title omitted]

The demurrer of the complainant to the Cross Bill of the defendant being argued, it is the opinion of the Court that the demurrer is good. Therefore it is decreed & ordered that the said Cross Bill be dismissed; and that the costs abide the further order of the Court.

John Erskine, U. S. Judge.

## ORDER DISMISSING BILL

[Title omitted]

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

1. That complainant's bill be dismissed.
2. That complainant pay the costs accruing on the original bill, and that defendant pay the costs of the Cross Bill.

In open Court Dec. 24, 1872.

John Erskine, U. S. Judge.

[fol. 818]

## EXHIBIT "U" TO AMENDMENT

Decision U. S. Supreme Court, 91 U. S., Page 283

WESTERN UNION TELEGRAPH COMPANY

v.

WESTERN AND ATLANTIC RAILROAD COMPANY

1. An agreement between a telegraph company and the State of Georgia, sole owner of a railroad, which provides that the company shall put up and set apart on its poles along said railroad a telegraph wire for the exclusive use of the railroad, equip it with as many instruments, batteries, and other necessary fixtures, as may be required for use in the railroad stations, run the wire into all the offices along the line of road, and put the same in complete working order, fixes the terms upon which officers of the road may transmit and receive messages through the connecting lines of the company, recognizes the right of way of the company along the line of road, regulates the use of the wire, and the compensation for it, and binds the State to pay the cost of constructing the wire and equipping the same at railroad stations not

already supplied with instruments, batteries, and other necessary fixtures does not constitute a sale of such wire, batteries & other instruments to the State, but is merely a contract for her exclusive use thereof.

2. As the ownership of such wire and instruments is in the telegraph Company a lease of the railroad by the State confers upon her lessees only such rights as she acquired under her contract with the company.

Appeal from the Circuit Court of the United States for the Northern District of Georgia

The State of Georgia, sole owner of the Western and Atlantic Railroad, desiring the use of a telegraph for the purposes of the road along its line, an instrument of writing providing therefor, bearing date Aug. 18, 1870, signed by William Orton, president on behalf of the Western Union Telegraph Company and by Foster [fol. 819] Blodgett, superintendent of the railroad, was approved by Rufus B. Bullock, Governor, and countersigned by H. C. Carson, Secretary of the executive department.

The substance of this agreement was, that the company should put up and set apart on its poles already there, along said railroad, a telegraph line for the exclusive use of the railroad; equip it with as many instruments, batteries and other necessary fixtures as might be required for use in the railroad stations; run the wire into all the offices along the line of the road, and put the same in complete working order. Other provisions related to the terms on which the officers of the road might transmit and receive messages through the connecting lines of the company; to the right of way of the company along the line of the road; and to other matters regulating the use of the wire, and compensation for it. The sixth article bound the State to pay, as soon as it could be ascertained, the cost of constructing the wire, and of equipping it at railroad stations not already supplied with instruments, batteries, and other necessary fixtures. Shortly after the wires were set up and the instruments put in working order, the Governor of the State, under authority of an act of the legislature, granted conveyed, and leased "the Western and Atlantic Railroad, which is the property of the State of Georgia, together with all its houses, work shops, depots, rolling-stock, and appurtenances of every character for the full term of twenty years, to certain persons who became a body corporate by the name of "The Western and Atlantic Railroad Company."

The railroad Company took possession of the road and its appurtenances under the lease, including the wire and batteries and instruments put on the road and in its offices by the Telegraph company under the contract with the State, but having this possession refused to pay for the transmission of messages over connecting lines according to the terms of the contract, and claimed that it was not bound thereby, and that, in fact, the true construction of

that agreement being that the State had bought and paid for the [fol. 820] wire and instruments, and owned them, it, as lessee of the State, had the right to control and use them without any liability to the Telegraph company.

The Telegraph Company, in its bill of complaint, states the refusal of the railroad company to recognize its rights in any respect, while insisting on using the wire and apparatus, and withholding from the complainant any use of them in the offices and depots of the road; alleges that these considerations induced the complainant to treat as revoked and withdrawn all power and privilege on the part of the defendant to use said wire and apparatus, or to receive compensation therefor; and that the complainant, seeking to recover possession of them, had been hindered and obstructed by the defendant in so doing. The bill prays that the defendant be enjoined from using said wire, from hindering or obstructing the complainant in the use of it, or in severing it from the offices of the defendant, and for such other and further relief as the nature of the case requires.

The railroad company, in its answer, denies that the contract between the telegraph company and the State is valid, being without authority of law; asserts that, if valid, it, as lessee of the railroad, is not bound by the terms thereof; and that, by the true construction of that contract, the State became the purchaser and owner of the wire and instruments, and that the company succeeded to this ownership without being bound by the other terms of the agreement.

The railroad company also filed a cross-bill, setting up this view of its rights, and praying an injunction against the telegraph company to restrain it from interfering with the use of the wire and apparatus so acquired from the State.

The District Court dismissed this cross-bill on demurrer, and on hearing the original bill of the complainant, the answer and evidence, decreed that the wire and instruments in question are the property of the State of Georgia, and are included in the lease to the railroad company; and that this company is not bound by the [fol. 821] terms of the contract in other respects, unless adopted by it; and therefore, dismissed the bill.

Mr. Justice MILLER, after stating the case as above, delivered the opinion of the court.

We differ with the District Court as to the construction of the instrument. We do not think that the State simply bought a wire and batteries and other instruments, and became absolute owners of them: on the contrary, we think that the contract was for the use of a wire and instruments of the telegraph company.

The language of the first covenant of the telegraph company is, that it agrees "to set apart on its lines of poles along said railroad a telegraph wire for the exclusive use of said party of the second part." The further covenants are all consistent with this. The contract for the use of this wire in connection with the others,

and for the use of one of the wires already there when this shall be disabled, the fact that it is placed upon the poles of the company already in use for two other wires, the agreements regulating the offices, and, in short, the whole frame of the contract, show that the wire, the poles, the instruments, were the property of the telegraph company, with exclusive use of this wire transferred to the railroad.

This view is perfectly consistent with the idea that the State should pay the cost and expense of the additional wire and instruments rendered necessary by this agreement for its exclusive use, which does not prove that any thing more than this right to exclusive use passed to the State.

If this be true, the railroad company, taking possession of this wire and instrument under claim of right from the State, must use it on the terms which bound the State, or not use it at all.

The ownership being in the telegraph company, the road could only have such use of it lawfully, as it acquired from the State; and the right of the State to the use of it is governed by the terms of the agreement.

[fol. 822] It is said that the contract between the State and the telegraph company is void, because the superintendent and the governor had no power to make it, and because it is oppressive and extortionate.

We do not decide whether this be so or not. Whenever the railroad company or the State shall cease to use the wire, shall abandon the contract and leave the instruments severely alone, and the complainant shall then seek to compel compliance with the contract, it will be time to decide that question; but so long as this company by the use of the wire and the apparatus, gets the benefit of the contract, it must also abide by the terms in other respects.

We are embarrassed in this view of the subject by the unskilful character of the bill. The relief it seeks is the very last one would think of; namely to enjoin the railroad company from the use of a wire and battery and instruments running along their line, and fixtures in their offices and depots, where they may remain until it be the pleasure of the complainant to take them away. The right to compensation for what the complainant has suffered by the failure of defendant, while using the wire, to comply with the covenants of the State, can be understood, and the right of defendant, when performing the covenants of the State, to use the wire, can be understood; the right to a rescission of the contract, if either party prayed therefor, can be understood: but this right which each claims, that it shall be let alone by the other to do as it pleases in regard to this wire, is very difficult to understand.

Complainant, in the petition, treats as revoked the power and privilege of defendant to use the wire and instruments. Is this an abandonment of the contract by complainant?

But there is in the bill a prayer for such other and general relief as the case may require. There is also the following stipulation after the pleadings are all in, which relieves us of much difficulty:

"It is agreed by counsel, that if the use of the wire by the defendant [fol. 823] ant is affected by the contract entered into between the complainant and the State (which contract is copied in the exhibit to the bill) in such manner as that the terms of said contract must be observed and complied with by defendant in order to retain the right to such use, the case is one proper for reference to the master to take an account, unless the court should adjudge that there is no right in complainant to relief in equity."

Now, we are of opinion that the use of the wire by defendant is affected by the contract between complainant and the State, in such manner, that such use requires the defendant to comply with the terms of that contract.

We are also of opinion that to prevent multiplicity of suits, and to have an accounting, instead of bringing a suit on every specific violation of the covenants of the State, complainant has a right to relief in equity.

The decree of the Circuit Court is, therefore, reversed, with directions to refer the case to a master to state an account on the terms of the contract between the State and the telegraph company, as between the complainant and defendant, for the time defendant has used the wires, batteries, and equipments put up under that contract, and to render a decree for that account.

Mr. Justice Field dissented.

[fol. 824]

#### EXHIBIT V TO AMENDMENT

Western and Atlantic Railroad, Superintendent's Office

Atlanta, Ga., Sept. 12, 1876.

Norman Green, Esq., Vice Prest. Western Union Telegraph Co.,  
New York.

DEAR SIR: Your favor of the 5th inst. is at hand and contents noted. In reply thereto I have to say that upon the return to me of the enclosed receipt properly signed, I will remit to your treasurer the sum of \$4,000.00 as requested.

I herewith send you a certified copy of a resolution passed by our Executive Committee, which our Attorney says is all that your Company will need to show a recognition by our Company of the contract. So soon as the receipt is returned I will give the necessary orders for our operators to commence taking receipts of commercial messages on your account as agreed in the contract, and in all other respects we will comply with the contract on our part. Please send me franks for the following named officers of our Company, viz: Joseph E. Brown, Prest., Wm. MacRae, supt., W. C. Morrill, Tr., R. A. Anderson, Genl. Frt. Agt., DW. Appler Genl. Ticket Agt. & B. W. Wrenn, Genl. Pass'r Agt., and send me the list of your officers for whom you desire passes over our road.

Hoping that we may both prosper under the contract, and that our relations in future may be harmonious, I am

Yours respectfully, Wm. MacRae, Supt.

MacRae social N40/N45.

(Endorsed on back of first page:) Gen. Wm. MacRae, Con. Supt. Western & Atlantic R. R. Sept. 12, 1876. Enclosing receipt in settlement as per compromise. Further correspondence by telegraph. Answered Sept. 16. (Endorsed on back of second page:) Wm. MacRae Gen. Supt. Western & Atlantic R. R. Sept. 12, 1876. Enclosing ratification of contract and receipt in settlement.

[fol. 825]

#### EXHIBIT "W" TO AMENDMENT

Resolved: That upon the Western Union Telegraph Company signing the receipt prepared by our attorney: that the Treasurer of this Company pay over to said Telegraph Company the sum of Four thousand dollars in full and complete settlement of all liability of this Company to said "Western Union Telegraph Company" as stated in said receipt for and on account of a contract made on the 18th day of August 1870 by the "Western & Atlantic Railroad" through its Superintendent (Foster Blodgett) and approved by Rufus B. Bullock as Governor of Ga., of the one part and the Western Union Tel. Co., of the other part; which said Contract we hereby agree to comply with and carry out, during the balance of our term or lease of the "W. & A. R. R." said Telegraph Company being also bound to comply with the stipulations relating thereto in said contract.

I certify that the foregoing is a true copy of a resolution adopted by the Executive Committee of "The Western and Atlantic Railroad Company" at a meeting held Sept. 11th, 1876.

W. C. Morrill, Secretary. (Seal.)

[fol. 826]

#### EXHIBIT "X" TO AMENDMENT

\$4,000.00.

Atlanta, Ga., Sept. 11, 1876.

Received of the Western and Atlantic Railroad Company Four Thousand Dollars in full and complete settlement of the litigation between the W. U. Tel. Co., and the W. & A. R. R. Co., in the U. S. Circuit Court for the Northern District of Ga., recently tried in the Supreme Court of the United States. Said sum is in full of all damages and claims of damages against said W. & A. R. R. Co., for and on account of said suit and in full of all money received by said Company for telegraphing to this date, to which said W. U. Tel. Co., might have had any claim or demand and in full of all

legal costs and charges and attorneys or solicitors' fees. And in full of all demands or claims of any kind or nature whether in litigation or not that said W. U. Tel. Company may now have or may have had in the past against said W. & A. R. R. Company on account of a contract made by the W. & A. R. R. by its Superintendent Foster Blodgett, and approved by Rufus B. Bullock as Governor of Ga., of the one part, and the W. U. Tel. Co., of the other part, on the 18th day of August 1870—which said contract is to be observed hereafter during the continuance of the balance of the period of the lease of the W. & A. R. R. to said W. & A. R. R. Co., by said Company and by the W. U. Tel. Co.

The Western Union Tel. Co., By (Sgd.) William Orton,  
President.

[fol. 827]

EXHIBIT "Z" TO AMENDMENT

Directing Examination of Transfer of Certain Rights to Western  
Union Telegraph Company

No. 41.

Whereas, Foster Blodgett, Superintendent of Western Atlantic Railroads, entered into a contract on the 18th of August 1870, with the Western Union Telegraph Company, by the terms of which, he turned over the property of the road known as the telegraph line from Atlanta to Chattanooga, to said Western Union Telegraph Company, which contract is onerous, unjust, and of no binding force upon this State: therefore be it

Resolved by the House of Representatives, the Senate concurring, That the Governor of this State be, and he is hereby requested, to instruct the Attorney-General to examine into the facts and circumstances of said contract, and if it shall appear that there are good grounds to authorize the re-cinding of said contract, that said Attorney-General be instructed to institute proceedings to that end.

Approved October 22, 1887.

(Ga. Laws, 1887, pg. 911.)



[fol. 828]

## EXHIBIT "AA" TO AMENDMENT

## Settlement State Rights in Property Connected with Western and Atlantic Railroad

## No. 33

A Resolution to provide for settlement of the rights of the State in the various properties connected with the Western & Atlantic Railroad and of encroachment on the rights of way of said railroad and to protect the free and unobstructed use of the rights of way of said railroad, and for other purposes.

Be it resolved by the House of Representatives, the Senate concurring, that the Governor and Attorney-General of the State are hereby authorized and instructed, as soon as practicable, and from time to time when occasion may arise, to examine and inquire into all the various trespasses, encroachments and occupation of the properties connected with the Western and Atlantic Railroad, and of the rights of way of said railroad, which, on pages eighty and eighty-one of the printed report of the Special Attorney of the Western & Atlantic Railroad, have been referred for legislative direction, and shall also examine and inquire into all other trespasses, claims and encroachments, possession and occupation made, had or held of any property connected with said railroad in which the State has any interest, and also of all interests, claims or demand which any person or corporation may assert in and to any of the property or rights of way connected with said railroad other than that of the present lessee.

Resolved further, that, after having so examined and inquired, the Governor and Attorney-General shall, after consultation with the Special Attorney of the Western and Atlantic Railroad, and through said attorney effect, if possible a settlement of each and every case of encroachment, adverse claim, occupation or right, held against the interest of the State in such a manner and on such terms as will [fol. 829] be fair and equitable, and will in their judgment best protect the rights and interests of the State in the matter at issue; provided, that such settlements and agreements shall be by consent of the lessees or made subject to the rights of the lessees under the contract of lease; provided further, that all such agreements and settlements shall not be final, but provisional only and subject to ratification by the General Assembly, and at the first meeting of the General Assembly after any settlement or agreement has been made in any case, the facts and details relating thereto shall, by the Governor, be communicated to the General Assembly for their action.

Resolved further, That after due and proper negotiation in any case, if no settlement be reached or without any negotiation if it shall be deemed best, the Governor and Attorney-General shall, if they deem it best to protect the interest of the State, advise and instruct the institution of legal proceedings, and when so advised the Special Attorney of the Western and Atlantic Railroad shall institute and

prosecute all proper legal proceedings necessary in his judgment to protect, define or determine the rights of the State in the subject-matter at issue.

Resolved further, That the Governor is hereby requested and directed to continue the employment of a Special Attorney for the Western & Atlantic Railroad until otherwise directed. His duties and compensation shall be the same as are provided in the Act approved December 20th, 1892, for such Special Attorney.

Resolved, That if at any time the service of a Surveyor or Civil Engineer be required, the Governor is authorized to employ him and pay his service from the contingent fund, as he is also authorized to pay for any other necessary service or expense connected with said property and the litigation concerning the same.

Approved December 19th, 1893.

(Georgia Laws, 1893, pg. 501.)

[fol. 830]

# EXHIBIT "BB" TO AMENDMENT

## Western and Atlantic Railroad—Controversies Concerning

### No. 13

Be it resolved by the House of Representatives, the Senate concurring, That the Governor be, and he is, hereby authorized, in his discretion to create a special commission for the purpose of hearing, considering, and finally determining any and all matters of controversy and issues, both of law and of fact, between the State of Georgia and any person or persons affecting or relating to the Western and Atlantic Railroad, its rights, ways and properties that may be submitted to it; such commission to consist of three citizens of high character and ability, to be appointed by the Governor, and who shall receive such compensation as may be fixed by him, subject, nevertheless, as to amount, to the approval of the General Assembly at its next meeting.

Be it further resolved, That such commission so authorized to be created shall have and be vested with all the power and authority of a court of law and equity of superior jurisdiction, with further authority to admit in evidence, consult and consider any and all such writings, papers, documents and legal records as in their judgment may be pertinent to the issues involved and proper to consult and consider in the particular case, whether or not such writings, papers, documents and legal records would be admissible in evidence under the strict rules of law; only such force and weight to be given to such writings, papers, documents, and legal records as, under all the circumstances of the particular case, the commissioner shall think right and proper; and the judgment and decree of the commissioner shall be so moulded in each case as to establish and give effect to all the rights and equities of the parties in the subject-matter, and which

shall be final and conclusive of all the issues submitted and decided, without right of appeal or exception to either party.

[fol. 831] Be it further resolved, That all findings, orders, judgments, and decrees of such commission shall be made subject and without prejudice to the rights of the present lessees of the Western and Atlantic Railroad under the contract of lease, excepting in such cases as the said lessees may voluntarily come in, be made a party, and submit its rights in the subject-matter to the adjudication of the commission, in which cases it shall be bound by such findings, orders, judgments, and decrees, as are other parties to the cause.

Be it further resolved, That in all such cases as may be submitted to such commission, the special attorney for the Western and Atlantic Railroad shall appear for and represent the State as its counsel, for which no extra compensation shall be allowed.

Be it further resolved, That should such special commission be created, the Governor shall submit to the General Assembly, at its meeting next thereafter, a copy of the findings, judgment and decree of such commission in each case heard and determined by it; and shall also report the amounts by him allowed the commissioners as their compensation, together with the amount of all other costs and expenses of the proceedings chargeable to the State, which amounts so allowed as compensation and for costs and expenses shall be subject to the approval and ratification of the General Assembly.

Approved December 18, 1894.

(Georgia Laws, 1894, p. 283.)

[fol. 832]

# EXHIBIT "CC" TO AMENDMENT

## In Senate

Whereas the Western and Atlantic Railroad has in a great measure destroyed the public highways in the several counties through which it passes, and the grading on said road is now much injured by the crossing of said high-way, and in many places it will remain a permanent injury to the Railroad when constructed:

Be it therefore

Resolved, that it shall be the duty of the Commissioners of the Western and Atlantic Railroad, to cause to be laid out and opened, a public highway, on such grounds as will interfere the least with the interest of travel on said highway, and to prevent its crossing the railroad, only at such points as the situation of the ground and the interest of travel may require.

Robert M. Echols, President of the Senate. December 21, 1839. Attest: David J. Bailey, Secretary. Joseph Day, Speaker of the House of Representatives. December 21, 1839. Attest: Joseph Sturgis, Clerk.

Approved 1st January, 1840. Charles J. McDonald, Governor.  
(Ga. Laws, 1839, pg. 227.)

## Resolutions Relative to the Western and Atlantic Railroad

Resolved, That John Caldwell and Michael Dickson are authorized to commence an action in the county of Walker against the Chief Engineer of the State of Georgia, to try the question of damages alleged to be sustained by them from the failure of the State to make payments according to the contract they had upon the Western and Atlantic Railroad, and that such trial shall be conducted as other cases; and the said Chief Engineer, in defense of the same, shall not plead the statute of limitations, nor defend against the claim for damages by any settlement that did not embrace the consideration and settlement of such damages.

And be it further resolved, That the State of Georgia and the parties plaintiff shall be bound by the issue of said case.

And be it further resolved by the authority aforesaid, That the Engineer be authorized to pay out of the proceeds of the road, the right of way or any damages which individuals may have sustained in consequence of the Western and Atlantic Railroad running through their lands—the damages to be awarded according to the present law regulating such cases.

Approved, February 23, 1850.

(Ga. Laws, 1849-50, p. 399.)

## EXHIBIT "EE"

An Act to Authorize the Governor of this State to Grant Certain Rights and Privileges to the Dalton and Gadsden Railroad Company

46. Sec. I. Be it further enacted, That His Excellency the Governor be and he is hereby authorized to grant to the said Dalton and Gadsden Railroad Company the right to construct and build their Railroad, for a short distance, upon the right of way of the Western and Atlantic Railroad; Provided, the said Dalton and Gadsden Railroad Company grant similar privilege to the Western and Atlantic Railroad; and provided further, that such grant to said Dalton and Gadsden Railroad Company, be not, in the opinion of the Governor, incompatible with the public interest.

Sec. II. Repeals conflicting laws.

Approved, Dec. 14th, 1859.

(Georgia Laws, 1859, p. 313.)

[fol. 834]

## EXHIBIT EE

An Act to Authorize the Governor of this State to Grant Certain Rights and Privileges to the Dalton and Gadsden Railroad Company.

Sec. I. Be it further enacted, That His Excellency the Governor be and he is hereby authorized to grant to the said Dalton and Gadsden Railroad Company the right to construct and build their Railroad, for a short distance upon the right of way of the Western and Atlantic Railroad; Provided, the said Dalton and Gadsden Railroad Company grant similar privilege to the Western & Atlantic Railroad; And provided further, that such grant to said Dalton and Gadsden Railroad Company, be not, in the opinion of the Governor, incompatible with the public interest.

Sec. II. Repeals conflicting laws.

Approved, Dec. 14th, 1859.

(Georgia Laws, 1859, page 313.)

[fol. 835]

## EXHIBIT "FF" TO AMENDMENT

An Act to amend the charter of the Georgia Western Railroad Company, passed in the year 1854, and to authorize the Governor to grant to said Georgia Western Railroad Company and the Polk Slate Quarry Railroad Company the right to build and construct their railroad on the right of way of the Western and Atlantic Railroad, and for other purposes.

9. Sec. II. That his Excellency the Governor of the State be and he is hereby authorized to grant to the Georgia Western Railroad Company the right to construct and build their Railroad on the right of way of the Western and Atlantic Railroad, within, and adjacent to the City of Atlanta, or if expedient, to any distance east of the Chattahoochee River, on the same condition as the grant to the Dalton and Gadsden Railroad Company, embraced in An Act entitled An Act to authorize the Governor of this State, to grant certain rights and privileges of the Dalton and Gadsden Railroad Company, approved the 14th of December, 1859.

10. Sec. III. And be it further enacted, That his Excellency the Governor of this State be, and he is hereby authorized to grant to the Polk Slate Quarry Railroad Company, the right to construct and build their Railroad on the right of way of the Western and Atlantic Railroad, within, and adjacent to the city of Marietta or if expedient to any distance east of the Kenesaw Mountain, on the same conditions as the grant to the Dalton and Gadsden Railroad Company, embraced in An Act entitled An Act, to authorize the Governor of this State to grant certain rights and privileges to the Dalton and Gadsden Railroad Company, approved the 14th of December 1859.

Provided, The privilege of the right of way, granted by this Act, shall not extend beyond one mile from the depot in Atlanta and Marietta, for each road, and upon the said roads paying so much for the said right of way as the Governor may deem right and proper for the interest of the State.

Assented to December 20th, 1860.

(Georgia Laws, 1860, p. 193.)

[fol. 836]

EXHIBIT "GG"

An act to empower the superintendent of the Western & Atlantic Railroad to convey to the proprietors of the Kennesaw House, in the city of Marietta, the right to rest the pillars of the verandah to said house, upon the west side thereof, upon the right-of-way of said Western & Atlantic Railroad.

Section 1. The General Assembly enacts, That, from and after the passage of this act, the superintendent of the Western & Atlantic Railroad be, and he is hereby empowered, and he is hereby directed, to grant to the proprietors of the Kennesaw House, in the City of Marietta, the right to rest the pillars of the verandah to said house upon the west side thereof, upon the east side of the right-of-way of said Western & Atlantic Railroad: Provided, the said pillars shall not occupy a space of more than three feet in width of said right-of-way: And provided further, That should the necessities of the Western & Atlantic Railroad require the space of ground so occupied, the same shall be taken on the application of the superintendent of said road, notice thereof being given three months previous, by the superintendent of the road, to the proprietor or lessee of the Kennesaw House.

Sec. 2. Be it further enacted, That all laws and parts of laws in conflict with this act be, and the same are hereby, repealed.

Approved October 25, 1870.

(Georgia Laws, 1870, p. 377.)

[fol. 837]

EXHIBIT "HH" TO AMENDMENT

An act to authorize the superintendent of the Western & Atlantic Railroad to convey to the Macon & Western Railroad certain land in exchange for certain land now owned by the said Macon & Western Railroad.

Whereas, The tracks of the Western & Atlantic Railroad leading into its round-house, and a large part of its carpentershop and carshed and its side-tracks south of its depot, are upon land belonging in fee simple to the Macon & Western Railroad Company, and subject to be demanded by said company at any times, and said land

is necessary for the operations of the Western & Atlantic Railroad; and whereas, the Western & Atlantic Railroad owns a part of the triangle formed by said roads and the old Monroe Railroad embankment which connects said railroads, which embankment and right-of-way belong in fee simple to the Macon & Western Railroad Company; and whereas, it is for the mutual benefit of said railroads that they should use in common said right-of-way to connect with each other—

Section 1. Be it enacted, etc., That the superintendent of the Western & Atlantic Railroad, with the approval of the Governor, is hereby authorized to convey in fee simple to the Macon & Western Railroad Company so much of said triangle as said superintendent and the Macon & Western Railroad Company, or its president, may agree upon, in consideration of said Macon & Western Railroad Company conveying in fee simple to the Western & Atlantic Railroad the land occupied by its said side-tracks south of its depot, (the lines to be definitely fixed,) and in further consideration of said Macon & Western Railroad Company conveying to the Western & Atlantic Railroad the right to keep its said shop and shed where they now are for the present; but when they are removed or destroyed, then the right to use, in common with said Macon & Western Railroad Company, said land for tracks for the mutual convenience of said railroads, and in consideration of a grant by the Macon & Western Railroad Company to the Western & Atlantic Railroad of the right forever to use in common with said Macon & Western Railroad Company, said right-of-way for the purpose of connecting with the said Macon & Western Railroad in the business between said two railroads.

Approved October 25, 1870.  
(Georgia Laws, 1870, p. 377.)

#### EXHIBIT "II" TO AMENDMENT

An act to amend an act entitled an act to incorporate the Georgia Western Railroad Company and to confer certain powers and privileges therein mentioned, approved February 18, 1854

Section 1. Be it enacted by the General Assembly of the State of Georgia, That the Georgia Western Railroad Company be, and they are hereby, authorized and empowered to construct their road on the right-of-way of the Western & Atlantic Railroad within and adjacent to the City of Atlanta, and to any distance east of the Chattahoochee river; Provided, That the right-of-way of the Western & Atlantic Railroad shall not be used beyond the limits now allowed by statute, except by the written consent of the lessees of the Western & Atlantic Railroad.

Sec. 2. Repeals conflicting laws.

Approved August 23, 1872.  
(Georgia Laws, 1872, p. 337.)



An act to empower and authorize telegraph companies in this State to construct their lines upon the right of way of the several railroad companies in this State.

"Section I. The General Assembly of the State of Georgia do enact, etc., That, from and after the passage of this act, it shall be lawful for any person or persons, or any duly incorporated telegraph company having the right to do business in this State, to construct, erect and maintain upon the right of way of the several railroad companies in this State, and along the lines thereof, their posts, fixtures and wires, and to operate the same.

"Sec. II. And be it further enacted, That said fixtures, posts and wires shall be erected at such distances from the tracks of said railroads as will prevent all or any damages to said railroad companies by the falling of said fixtures, posts and wires upon said railroad tracks, and said telegraph companies shall be liable to said railroad companies for all damages resulting from a failure to comply with the provisions of this act.

"Sec. III. And be it further enacted, That, in the event that any railroad company should deem that they had sustained damage by reason of the location of a telegraph line over their right of way, the damage, if any, shall be assessed and paid as follows: The railroad company shall select one commissioner, and the person or telegraph company constructing such telegraph line shall select another, and these two shall select a third, and the three persons thus selected shall assess the damage, if any, and the amount so awarded by them shall be paid by the person or telegraph company constructing said line to the railroad company.

"Sec. IV. Repeals conflicting laws.

"Approved August 26, 1872."

(Georgia Laws, 1872, pg. 78.)

"Use by Marietta and North Georgia Railroad of Right of Way of Western and Atlantic Railroad

### No. 38

"Whereas, the Marietta and North Georgia Railroad Company is an important feeder to the Western and Atlantic Railroad; and

"Whereas, It is and has been necessary for said Marietta and North Georgia Railroad to use (by and with the consent of the lessees of the Western and Atlantic Railroad) a portion of the right of way of the Western and Atlantic Railroad in order to deliver its freight and passengers to said Western and Atlantic Railroad Com-

pany, and is still necessary for the purpose of the same; therefore be it

"Resolved by the General Assembly of the State of Georgia, That the charter of the said Marietta and North Georgia Railroad Company be so amended as to authorize and empower said Marietta and North Georgia Railroad Company to lay out and construct their road from the city of Marietta, in the County of Cobb, to the Marble mills north of said city of Marietta upon the right of way of the Western and Atlantic Railroad, including that portion now occupied by the said Marietta and North Georgia Railroad within the limits of the city of Marietta, and to perpetually use and occupy the same for railroad purposes; Provided, that said Marietta and North Georgia Railroad Company shall in no way interfere with tracks or right of way now in use by said Western and Atlantic Railroad; Provided further, that this shall not apply to more than fifteen (15) feet on the extreme eastern edge or side of said right of way, and that due compensation shall be paid for the same to the State. This shall be submitted to arbitration, one arbitrator to be selected by the Governor and one by said Marietta and North Georgia Railroad Company, and in case they cannot agree said arbitrators to select a third, whose decision shall be final; provided further, that the consent of [fol. 840] the present lessees of the Western and Atlantic Railroad Company be first obtained to the use of said right of way as aforesaid, and that they consent that any and all compensation paid to the State therefor shall in no case accrue to them by any contract or lease now in force between them and the State.

"Be it further Resolved by the authority aforesaid, That all laws and parts of laws in conflict with this resolution be, and the same are hereby repealed.

"Approved October 9, 1885."

(Georgia Laws, 1884-5, pg. 677.)

[fol. 841]

#### EXHIBIT LL TO AMENDMENT

An Act by the General Assembly of Tennessee (Acts of 1837, Chapter 221, pp. 319, 320)

"Section 1. Be it enacted by the General Assembly of the State of Tennessee, That the State of Georgia shall be allowed the privilege of making every necessary recognizance and survey for the purpose of ascertaining the most eligible route for the extension of her Western and Atlantic Railroad from the Georgia line to some point on the Eastern margin of the Tennessee River.

"Section 2. And be it enacted further, That as soon as said route and point shall be ascertained, the State of Georgia shall be allowed the right of way for the extension and construction of her said railroad from the Georgia line to the Tennessee River, and that she shall be entitled to all privileges, rights and immunities (except the sub-

scription on the part of Tennessee) and be subject to the same restrictions as far as they are applicable, as are granted, made and prescribed for the benefit, government and direction of the Hiwassee Railroad Company.

"Section 3. And be it further enacted, That the foregoing rights and privileges are conferred upon the State of Georgia on condition that whenever application is made, she will grant and concede similar one and to as great an extent, to the State of Tennessee, or her incorporated companies."

[fol. 842]

EXHIBIT MM TO AMENDMENT

"An Act Conferring upon the State of Georgia Additional Rights in Relation to the Western & Atlantic Railroad

"Be it enacted by the General Assembly of the State of Tennessee, that all right, privileges, and immunities, with the same restrictions which are given and granted to the Nashville & Chattanooga Railroad Company, by the Act of the General Assembly of this State, incorporating said company, passed December 11th, 1845, are, so far as they are applicable, hereby given to and conferred upon the State of Georgia, to be exercised and enjoyed by that State in the construction of that part of the Western & Atlantic Railroad lying in Hamilton County, Tennessee, and in the management of its business."

(Passed February 3, 1848.)

(Laws of Tenn. 1847-48, pg. 330.)

[fol. 843]

EXHIBIT NN TO AMENDMENT

(2763.) 3459. Seven years vests estate, when.—Any person having had, by himself or those through whom he claims, seven years' adverse possession of any lands, tenements, or hereditaments, granted by this state or the State of North Carolina, holding by conveyance, devise, grant, or other assurance of title purporting to convey an estate in fee, without any claim by action at law or in equity commenced within that time effectually prosecuted against him, is vested with a good and indefeasible title in fee to the land described in his assurance of title.

(2764.) 3460. Seven years' neglect bars action.—And, on the other hand, any person, and those claiming under him, neglecting for the said term of seven years to avail themselves of the benefit of any title, legal or equitable, by action at law or in equity, effectually prosecuted against the person in possession, under recorded assurance of title, as in the foregoing section, are forever barred.

(2765.) 3461. Suit must be brought within seven years.—No person, or any claiming under him, shall have any action, either at law or in equity for any lands, tenements, or hereditaments, but within seven years after the right of action has accrued.

[fol. 844]

## EXHIBIT OO TO AMENDMENT

The Act of Tennessee of 1895 added the following provision to Section 2763 of the Code of Tennessee, of 1858, to-wit:

"But no title shall be vested by virtue of such adverse possession, unless such conveyance, devise, grant, or other assurance of title shall have been recorded in the register's office for the county or counties in which the land lies during the full term of said seven years' adverse possession."

[fol. 845]

## EXHIBIT PP TO AMENDMENT

## Western Union Telegraph Company

Meeting of the Board of Directors at the Executive Office, 145 Broadway, New York

June 5th, 1867.

Resolved, that this Company does hereby accept the provisions of the Act of Congress entitled "an Act to aid in the construction of Telegraph Lines, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 24, 1866, with all the powers, privileges, restrictions and obligations conferred and required thereby; and that the Secretary be and is hereby authorized and directed to file this resolution with the Postmaster General of the United States, duly attested by the signature of the Acting President of the Company, and the Seal of the corporation in compliance with the fourth section of said Act of Congress.

Adopted unanimously,

Hiram Sibley, Acting President of Western Union Telegraph Company. O. H. Palmer, Secy. W. U. Tel. Co. (Seal Western Union Telegraph Co.) Western Union.

Filed June 8, 1867. Jos. H. Blackfan, Chief Clerk.

[fol. 846]

## Post Office Department, Washington

April 3, 1922.

I certify that the annexed is a true copy of the original acceptance filed June 8, 1867, in this Department.

In Testimony Whereof I have hereto set my hand and caused the seal of the Post Office Department to be affixed, at the City of Washington, the day and year above written.

Hubert Work, Postmaster General of the United States of America.

On January 7th, 1892, the Georgia Railroad Commission adopted and issued the following rule or order:

January 7, 1892.

"Rule 2

"No telegraph office where messages are received and transmitted for the public shall be discontinued or abolished without first obtaining the consent of this Commission upon an application duly filed by the said company desiring such discontinuance wherein shall be stated the reasons therefor.

"Rule No. 2 to take effect at once."

This rule continued in effect until superseded in 1901 by the following rule of the Georgia Railroad Commission then adopted:

"Rule 2

"Each and every depot, station, office and agency now maintained, conducted or used in Georgia by any railroad, express or telegraph company doing business in this State, for the transaction of business with the public, is hereby formally established and located at the point and on the premises where the same is now being so maintained and conducted. No such depot, station, office or agency, as aforesaid, now established, or that hereafter may be established, pursuant to orders made by the Commission, or voluntarily by such company, or otherwise shall be closed, removed, suspended, discontinued or abolished without authority granted by the Commission upon written application."

The rule last quoted has been in force from the time of its adoption by the Georgia Railroad Commission to this date.

W. L. Clay, Dorsey, Brewster, Howell & Heyman, Movants' Attys.

ORDER ALLOWING AMENDMENT TO MOTION FOR NEW TRIAL

The foregoing amendment to motion for new trial is allowed. The recitals of fact in original motion and in this amendment and each of the grounds thereof, including the exhibits, and the statements therein are approved as true & correct.

In open Court this October 30, 1922.

W. D. Ellis, Judge S. C. A. C.

[File endorsement omitted.]

[fol. 849] GEORGIA,  
Fulton County:

IN FULTON SUPERIOR COURT

**Bill of Exceptions**—Filed Dec. 5 & 6, 1923

Be it remembered that the State of Georgia as the owner of the Western & Atlantic Railroad and of Nashville, Chattanooga and St. Louisville Railway as lessee from said State of said Western & Atlantic Rail Road, operating said railroad under the corporate name and style of Western & Atlantic Railroad, filed their petition in the Superior Court of Fulton County, Georgia, against the Western Union Telegraph Company, complaining, among other things, that the State of Georgia in its sovereign or governmental capacity is the sole and exclusive owner of the Western & Atlantic Railroad with its rights of way and properties; that the Western Union Telegraph Company is maintaining and operating over, upon and along the right of way of the Western & Atlantic Railroad from Atlanta, Georgia to Chattanooga Tennessee its poles and wires without authority from the State of Georgia, and contrary to the will and consent of its said lessee; that this constitutes an unlawful encroachment upon said right of way and an adverse use thereof, and is a continuing trespass. The petition, among other things, prays for a judgment establishing the claims of the petitioner, and requiring Western Union Telegraph Company to desist from such use and occupation. Upon said petition process was issued returnable to the March Term, 1920, of Fulton Superior and was served upon said Western Union Telegraph Company.

Thereafter at the March Term, 1920 of Fulton Superior Court, the Western Union Telegraph Company filed its answer to said petition.

Thereafter the plaintiffs in said cause filed their motion to strike said answer and to strike specified portions thereof upon grounds stated in said motion. Said motion came on to be heard, and was sustained in part and overruled in part by the following order or judgment of said court rendered December 4, 1920 at the November Term, 1920 of said court, to-wit:

[fol. 850] ORDER ON MOTION TO STRIKE ANSWER—Omitted in printing

---

The Western Union Telegraph Company then and there excepted to, and assigned error upon said order or judgment, and to so much thereof as sustains the motion of the said plaintiffs, and, before final judgment in said cause, and during the same term at which said order or judgment was rendered, and within the time allowed by law the Western Union Telegraph Company tendered its bill of exceptions pendente lite, assigning error upon said order or judgment upon the grounds in said bill of exceptions pendente lite, which bill

of exceptions pendente lite was on December 30, 1920, at the November Term, 1920 of Fulton Superior Court, and before the rendition of final judgment in the case, duly signed and certified as true by the Judge of Fulton Superior Court and ordered filed, and made a part of the record in the case.

[fol. 851] Thereafter and within the time allowed by the above mentioned order or judgment of Fulton Superior Court of December 4, 1920, the Western Union Telegraph Company filed in Fulton Superior Court two amendments to its answer previously filed therein.

Thereafter the plaintiffs in said cause filed their motion to strike from the amendments above mentioned to the answer of defendant certain specified portions thereof upon grounds therein stated. Said motion came on to be heard and was sustained in part and overruled in part by the following order, or judgment, of said court, rendered June 22, 1921 at the May Term, 1921 of said court, to-wit: [Omitted in printing.]

---

[fols. 852 & 853] The Western Union Telegraph Company then and there excepted to, and assigned error upon, said order or judgment and to so much thereof as sustains the said motion of plaintiffs, and before final judgment in said cause, and during the same term at which said order or judgment was rendered, and within time allowed by law the Western Union Telegraph Company tendered its bill of exceptions pendente lite assigning error upon said order or judgment upon grounds set forth in said bill of exceptions pendente lite, which bill of exceptions pendente lite was on July 1st, 1921, at the May Term, 1921 of Fulton Superior Court, and before the rendition of final judgment in the case duly signed and certified as true by the Judge of Fulton Superior Court and ordered filed and made a part of the record in the case.

Thereafter at the May Term, 1922 of Fulton Superior Court said cause came on to be heard before the court and a jury duly empaneled. During said trial and upon the conclusion of the introduction of evidence by the plaintiffs, defendant on May 18, 1922 moved orally for a non-suit of said cause upon the ground that plaintiffs' evidence did not prove the allegations of the petition and did not warrant a verdict for plaintiffs. The court orally denied said motion. The Western Union Telegraph Company then and there excepted to the order or judgment of the court overruling its motion for a new trial.

Thereafter and after evidence had been introduced by both plaintiffs and defendant the following verdict was rendered in said cause: [Omitted in printing.]

---

[fol. 853½] Thereafter the Western Union Telegraph Company on the 14th day of June, 1922, and during said May Term, 1922, of said Fulton Superior Court presented to the Judge of said court, and filed in said court its motion for a new trial in said cause, that the said verdict be set aside, that a supersedeas be granted and that



rule to show cause why said motion should not be granted be issued.

At the same time the plaintiffs in said cause presented to the Judge of said court a form of decree upon said verdict and prayed that the same be signed. The Western Union Telegraph Company thereupon objected to the signing of any decree until a decision upon its motion for new trial should be rendered, and prayed that the superseas requested in its motion for new trial should be granted, and that the signing of a decree be stayed and postponed until the motion for new trial should be decided.

The court overruled said objection of the Western Union Telegraph Company, and thereafter on June 14, 1922 rendered the following decree in said cause: [Omitted in printing.]

---

[fol. 855] At the time the said final decree in said cause was rendered an order was rendered on June 14th, 1922 upon said motion of defendant for a new trial approving the grounds thereof, ordering the plaintiffs to show cause on September 16, 1922 why said motion should not be granted; giving the defendant until the final hearing of the motion to make out and have approved and filed its brief of evidence and to perfect and have approved its motion for new trial; and providing that said order operate as a superseas to the verdict, and the decree in this cause. Service of said motion and of said order was acknowledged by counsel for plaintiffs, and all further service waived June 14th, 1922.

Thereafter on the 28th day of June, 1922, and during the May Term, 1922 of Fulton Superior Court, the Western Union Telegraph Company within the time allowed by law therefor tendered its bill of exceptions pendente lite, assigning error (a) upon the overruling [fol. 856] of its motion for a nonsuit in said cause, (b) upon the judgment of the court overruling the objections of the Western Union Telegraph Company to the rendition of a decree in said cause pending the hearing of its motion for new trial, (c) to so much of the final decree in said cause as directed the Western Union Telegraph Company to remove its wires, poles and structures within twelve months from the final determination of the cause, and (d) to so much of said decree as relates to right of way in the State of Tennessee, to all of which the Western Union Telegraph Company objected on grounds set forth in said bill of exceptions pendente lite. Said bill of exceptions pendente lite was, before the rendition of final judgment in the case, and during the said May Term, 1922 of Fulton Superior Court, on June 28th 1922 duly signed and certified as true by the Judge of Fulton Superior Court and ordered filed and made a part of the record in the case.

On September 15th, 1922 an order was granted by the Judge of Fulton Superior Court in said cause assented to by plaintiffs and defendant continuing the hearing of said motion for new trial to Oct. 7th, 1922, or as soon thereafter as that hearing could be had giving the right to movant to have brief of evidence and its motion

for new trial approved and filed on or before the day upon which said motion should be finally heard, and preserving all rights granted to movant in the original order upon said motion for new trial.

Thereafter on Oct. 4th, 1922 by consent of counsel for plaintiffs and defendant, and with the consent of the court said motion was continued and re-assigned for hearing on October 14th, 1922. On October 14, 1922 an order was rendered to which all parties consented re-assigning the hearing of said motion for new trial for Friday October 27th, 1922, preserving and continuing all rights previously granted movant.

Thereafter on October 27, 1922 the hearing of said motion was [fol. 857] continued by the court, all parties consenting from day to day until the said brief of evidence and motion for new trial as amended and the grounds thereof had been approved. On October 30th, 1922 an order or judgment was rendered by the Judge of Fulton Superior Court, allowing the amendment aforesaid to defendant's motion for new trial, and approving as true and correct the recitals and statements of fact in the original motion for new trial, and in the aforesaid amendment thereto and each of the grounds thereof including the exhibit thereto; and at the same time and on the same day an order or judgment was rendered by the Judge of said court approving the brief of evidence in said cause. The said amendment to said motion for new trial and said brief of evidence were duly filed in Fulton Superior Court and thereafter said motion for new trial came on to be heard and was thereafter on November 2, 1922, during the — Term, 1922, of Fulton Superior Court, overruled and a new trial denied the Western Union Telegraph Company by the following order or judgment of Fulton Superior Court entered on the original motion for new trial: [Omitted in printing.]

To the last named judgment overruling its motion for new trial and denying it a new trial, the Western Union Telegraph Company then and there excepted and now excepts.

Be it further remembered that the Western Union Telegraph Company now excepts to and specifically assigns error, of which it complains:

1. Upon the judgment in said cause upon plaintiffs' motion to strike the original answer in the cause and portions thereof; upon the bill of exceptions pendente lite sued out by the Western Union [fol. 858] Telegraph Company first hereinabove mentioned during the November Term, 1920, of Fulton Superior Court, and upon each of the rulings or judgments therein complained of.

2. Upon the judgment in said cause upon plaintiffs' motion to strike portions of the amendments to defendants answer; upon the bill of exceptions pendente lite sued out by the Western Union Telegraph Company second hereinabove mentioned during the May Term 1921, of Fulton Superior Court, and upon each of the rulings or judgments therein complained of.

3. Upon the judgment of the court overruling defendant's motion for a non-suit of said cause and denying the same; upon the

judgment overruling defendant's objection to the rendition of a final decree in said cause; upon the bill of exceptions pendente lite sued out by the Western Union Telegraph Company third hereinabove mentioned during the May Term, 1922, of Fulton Superior Court, and upon each of the rulings or judgments therein complained of.

4. Upon the verdict hereinabove set forth rendered in said cause.
5. Upon the final decree rendered in said cause hereinabove set out.
6. Upon the refusal of the court to set aside the verdict rendered in said cause and to grant the Western Union Telegraph Company a new trial upon each and all of the grounds contained in its original motion for new trial and the amendment thereto; and upon the judgment of the court herein above set forth overruling said motion for a new trial and denying the same.

The Western Union Telegraph Company specifies as the evidence material to a clear understanding of the errors complained of the whole of the brief of evidence in said cause, including the entry of filing thereof and the order of the court approving said brief of evidence, the said brief of evidence being of file as a part of the record of said cause.

[fol. 859] And the Western Union Telegraph Company hereby specifies as material to a clear understanding of the errors complained of the following parts of the record in said cause, to-wit:

1. Original petition with the entry of filing thereof.
2. Original answer and all exhibits thereto with the entry of filing thereof.
3. Plaintiffs' motion to strike original answer and portions thereof with the entry of filing thereof.
4. The order of Judge Pendleton of December 4th, 1920 on the last above motion with the entry of filing thereof.
5. Bill of exceptions pendente lite assigning error on the last above order with the entry of filing thereof.
6. The amendment to the answer of defendant with all exhibits thereto, the first numbered paragraph of this amendment being XII with the entry of filing thereof.
7. The amendment to defendant's answer with all exhibits thereto, the first numbered paragraph of this amendment being XX with the entry of filing thereof.
8. Plaintiffs' motion to strike from the last above amendments to defendant's answer with the entry of filing thereof.
9. The order on the last mentioned motion rendered June 22nd, 1921, with the entry of filing thereof.

10. Bill of exceptions pendente lite assigning error on the last above mentioned order with the entry of filing thereof.

11. The charge of court and the order approving the same with the entry of filing thereof.

[fol. 860] 12. The verdict with the entry of filing thereof.

13. The final decree with the entry of filing thereof.

14. Bill of exceptions pendente lite assigning error on the refusal of the court to grant a non-suit, and on the final decree with the entry of filing thereof.

15. Original motion for new trial with the entry of filing thereof.

16. Order on motion for new trial dated June 14th, 1922, and the acknowledgment of service of said motion for new trial and of the order thereon endorsed thereon by counsel for plaintiffs, with the entry of filing thereof.

17. Order on motion for new trial dated Sept. 15th, 1922, the assent of counsel for both parties endorsed thereon, with the entry of filing thereof.

18. Order on motion for new trial dated Oct. 14th, 1922, the assent of counsel for both parties endorsed thereon with the entry of filing thereof.

19. Amendment to motion for new trial and all exhibits thereto, the order approving the same, with the entry of filing thereof.

20. Judgment or decision overruling defendant's motion for new trial, with the entry of filing thereof.

And the Western Union Telegraph Company, now on this — day of November A. D. 1922, within thirty days from the adjournment from the September Term of Fulton Superior Court during which the above mentioned motion for new trial was overruled, and within thirty days from the date of that decision or adjourned judgment, tenders this its bill of exceptions and prays that the same may be signed and certified as required by law.

W. L. Clay, Savannah, Ga., Dorsey, Brewster, Howell & Heyman, Atlanta, Ga., Attorneys for Western Union Tel. Co.

[fol. 861]

#### IN FULTON SUPERIOR COURT

#### ORDER SETTLING BILL OF EXCEPTIONS

I do certify that the foregoing bill of exceptions is true and specifies all of the evidence, specified all of the record, material to a clear understanding of the errors complained of; and the clerk of the Superior Court of Fulton County is hereby ordered to make out a

complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the March, 1923, Term of the Supreme Court that the errors alleged to have been committed may be considered and corrected.

This 1st day of December A. D. 1922.

W. D. Ellis, Judge Superior Court, Atlanta Circuit.

Due and legal service of the within and foregoing signed and certified bill of exceptions is hereby acknowledged, Copy received, all other and further service waived this November 5, 1922.

Hooper Alexander, Tye, Peeples & Tye, Attys. for Defts. in Error, Residing in Atlanta, Ga.

[File endorsement omitted.]

---

[fol. 862] SUPREME COURT OF GEORGIA

ORDER REQUESTING GOVERNOR TO APPOINT JUDGE TO SIT,  
ETC.—Omitted in printing

---

[fol. 863] STATE OF GEORGIA:

Executive Department, Atlanta

[Title omitted]

ORDER OF GOVERNOR APPOINTING CUSTER, J.—Filed Feb. 5, 1923;  
omitted in printing

[fol. 864] [File endorsement omitted]

---

[fol. 865] SUPREME COURT OF GEORGIA

# JUDGMENT

Atlanta, September 13, 1923.

The Honorable Supreme Court met pursuant to adjournment.  
The following judgment was rendered:

[Title omitted]

This case came before this court upon a writ of error from the superior court of Fulton county; and, after argument had, the case being for consideration by a full bench of six Justices, after con-

sideration, (and though there is no disagreement as to many points presented for decision) three Justices, to wit, Russell, C. J., Hill and Gilbert, JJ., are of the opinion that the judgment of the court below should be affirmed, and three Justices, to wit, Beck, P. J., Atkinson, J., and Custer, J., (who was designated by the Governor, and presided in place of Hines, J., disqualified), are of the opinion that the judgment of the court below should be reversed, and therefore the judgment of the lower court stands affirmed by operation of law.

Bill of costs, \$15.00.

[fol. 866]

SUPREME COURT OF GEORGIA

[Title omitted]

OPINION

Russell, C. J.

1. The State of Georgia in its sovereign capacity is the owner of the Western and Atlantic Railroad and the right of way upon which it is constructed.
2. Section 6 of the act of 1852 (Acts 1852, p. 193), the caption of which is "An act to incorporate the Augusta, Atlanta, and Nashville Magnetic Telegraph Company," is void, because it violates the clause of the constitution of 1798 which provides: "nor shall any law or ordinance pass, containing matter different from what is expressed in the title thereof,"
3. Under the doctrine of *nullus tempus occurrit regi*, adverse possession as against the State of Georgia cannot provide the basis for a prescriptive title; and the State is not affected by a statute of limitations unless it expressly consents to be held subject thereto.
  - (a) Under the facts of this case a title by prescription could not be ripened by the possession of the predecessor in title of the plaintiff in error within the period of time when the State may be held to have waived the operation of the statute of limitations.
  - (b) The plea of laches is not available as against a sovereign State. The State cannot be guilty of negligence or any other similar act involving the omission to perform a duty devolving upon an ordinary citizen.

[fol. 867] RUSSELL, C. J.: There are, in all, more than one hundred assignments of error in the present case. Under ordinary juridical rules we should first deal with such assignments of error as are raised by rulings upon demurrers or motions to strike. The present record calls for decisions upon exceptions to each of these

classes. After consideration of all of these exceptions we have reached the conclusion that the case must be decided upon the motion for a new trial for the reason that the questions raised upon exceptions pendente lite, upon the demurrers and upon the motions to strike various portions of the defendant's answer are all involved and to be adjudicated, in our conclusion, upon the points raised by the motion for a new trial, and for that reason the same reasons which control our ruling upon the motion for a new trial would affect and control rulings to the same effect upon the almost innumerable number of exceptions raised preliminary to the trial. In the economy of time we pretermit specific discussion of the various preliminary assignments of error for the reason that the same controlling questions are raised both in the grounds of the motion for a new trial, with which we shall deal, as are raised by the various assignments of error predicated upon the preliminary motions. Considered in its ultimate analysis, the controlling issues in this case are very few. The action is one in which the State of Georgia seeks to remove alleged encroachments by the Western Union Telegraph Company from its right of way. The plea of the defendant, in its last analysis, amounts to nothing more than an assertion of title which will defeat the suit of the plaintiff. The action is not strictly an action in ejectment. It is an equitable petition in the nature of an action of ejectment. [fol. 868] Since the passage of the uniform procedure act of 1887, as has frequently been ruled by this court, legal and equitable remedies may be had in the same suit in a superior court. So, at last, the case turns upon the question whether the evidence in behalf of the defendant is sufficient to set up any legal reason why it should not be disposed of that portion of the right of way of the Western & Atlantic Railroad which it asserts it is entitled to enjoy. It is not to be denied that in this action the plaintiff must recover upon the strength of its title and not upon the weakness of the title of the Western Union Telegraph Company. Of the fact that the State of Georgia is the owner of the Western & Atlantic Railroad, the lower court could properly take judicial cognizance, and no proof was required to establish the State's ownership. Therefore, upon the reading of the petition the plaintiff, even if this were a suit in ejectment, would have cast the burden upon the defendant to establish the validity of its claim of right or title, and therefore the question is still further narrowed to the single question as to whether the defendant in this case carried the burden of establishing its right to occupy any portion of the right of way of the Western & Atlantic Railroad. We hold that there was a failure on the part of the defendant in the court below, and plaintiff in error here, to establish its contention that it was the owner of any interest whatsoever in the right of way of the Western & Atlantic Railroad, either by grant, prescription or otherwise, and that for that reason any error committed by the court during the trial was powerless to prevent the verdict rendered by the jury and the judgment entered thereon.

I am of the opinion that the judgment of the trial court in over- [fol. 869] ruling the motion for a new trial was right. There was no error in this ruling because, in my opinion, the verdict was de-



manded by the evidence for the reason that the case is controlled by two propositions under which the jury could not have found otherwise than they did, and for that reason the merits of all remaining assignments of error are irrelevant and immaterial. I freely concede that there were quite a number of errors in the conduct of the trial but none of them affected or could have affected the result reached in the case, and in my opinion, no other result could have been attained either as a matter of reason or of law.

There can be no question that the State is the owner of the right of way of the Western & Atlantic Railroad and has been its owner since the first beginning of the undertaking and from the time when the State invested its first dollar in the enterprise. It is immaterial whether the ownership is in fee or only an easement. But even if it be conceded for the sake of argument that the State only acquired an easement for its right of way it must be held that no right, interest, or enjoyment of even what the plaintiff in error admits is owned by the State has ever been lawfully granted by the State to anyone. It is insisted by the plaintiff in error that in granting the charter of the Augusta, Atlanta & Nashville Magnetic Telegraph Co. in 1852 (Acts 1852, p. 193) the State ratified the contract which had previously been entered into by William L. Mitchell with the approval of Governor Towns, (then chief executive of Georgia), and by the terms of which the Augusta, Atlanta & Nashville Magnetic Telegraph Co. (under whom defendant claims its title) was granted the easement which the defendant claims.

[fol. 870] The correctness of this position must depend upon the validity of section 6 of the act which relates to the contract entered into on the 11th day of October, 1850, by William L. Mitchell, chief engineer of the Western & Atlantic Railroad and E. W. Garst and J. M. Bean, as well as other provisions of the charter to which we shall later refer more specifically. In our opinion, section 6 of the act of 1852, *supra*, was and is unconstitutional and absolutely void. The caption of the act is as follows: "An act to incorporate the Augusta, Atlanta and Nashville Magnetic Telegraph Company." It will be noted at the outset that the caption does not contain the words "and for other purposes" usually found in captions to legislative acts. It is an act with but one purpose,—to incorporate the telegraph company. There is not the slightest indication in the title of any connection with any other subject than the conveyance of such powers as would usually be conveyed in a charter authorizing the business of telegraphy to be done by a corporate body—thus permitting an artificial person as such to carry on the business of telegraphy such as a natural person might have done. In a caption so abbreviated, there is no suggestion that there would be any provision as to the right of way, or easement, or franchise, call it what you will, except those that ordinarily appertain. For this reason it is inferable from the caption that if the proposed corporation entered the telegraph business they would have to secure their right of way in the manner provided by law. This would mean either by acquiring the right of way by gift or purchase from the owners of the land which its line would traverse, or by condemnation pro-

ceedings. And it has been held by this court that this particular [fol. 871] right of way cannot be condemned without express legislative authority, and none such has been granted by the sovereign State. *Western Union Telegraph Co. v. Western & Atlantic Railroad Co.*, 142 Ga. 532, 534. Further there is no intimation or suggestion that the additional powers attempted to be conveyed in the act, to which we shall presently refer, were intended to be given. The act is only to incorporate a named company, which, it might be assumed from the use of the word "telegraph" would engage in the business of taking and sending messages by telegraphy. There is no reference, for that matter, to the fact that any powers or rights of any kind were conveyed more than the creation of a corporation which would conduct a telegraph business. From the caption, one would as easily infer that the company had already acquired a right of way as that it was still to be acquired, or that the right of way was to traverse one route as well as another provided communication was made between the cities named, to wit, Augusta, Atlanta and Nashville. Certainly it would have taken an extraordinary imagination to conceive or more than a prophetic ken to know from a reading of the caption of the proposed act upon which the members of the General Assembly were called upon to vote, that an act with such a caption had within its bowels a provision by which it was to receive from the State of Georgia a perpetual use of any property owned by the State. Not a single member of the General Assembly would be apprised of the fact that an act incorporating any named individuals would include therein a sale or donation of any portion of any property of the State, and yet if the proposition now insisted upon by the plaintiff in error be correct, it would have been permissible for the General Assembly to have made a donation to this company of its [fol. 872] entire right of way. This is not the usual rule. In this case, if the contention insisted upon be sustained, the use of the phrase "incorporate" may include the right of the State not only to create such corporation but the obligation to assist in its formation and to contribute to its support, and therefore instead of the general rule by which the grant of a charter merely gives life to a new creature with the duty evolving upon the new creature to work out its own destiny, (or, to use the more expressive vernacular,— "to root hog or die"), the term "incorporate" would contain an inference that not only were certain persons authorized to form an association to carry on a certain business in their own behalf and by their own efforts, but that it must be held to mean that the State by donation or by contract was also contributing in a material way to the success of the corporation about to be created. It is a remarkable fact that so far as is known, this is the first instance since the great Yazoo Fraud that such covert legislation was attempted in Georgia. In our opinion the caption of the act now under consideration would have been just as misleading to the members of the General Assembly of 1852 as the act entitled an act "for the payment of the late State troops" and which contained a provision for the disposition of Georgia's entire western territory, to repeal which James Jackson resigned from the Senate of the United States in order to become a

member of the General Assembly. To my mind, this section of the act of incorporation is void and consequently no rights thereunder can be derived by the defendant in this case because its predecessors had none.

We have dealt with one peculiar feature which avoids the act of [fol. 873] 1852, but there is another. The contract which was sought to be ratified is as follows:

"Chief Engineer's Office, W. & A. R. R.

Atlanta, Oct. 11, 1850.

"GENTLEMEN: I have given much reflection to the subject of your note of yesterday, and I have had full and free conversation with His Excellency Geo. W. Towns upon the subject, and we are fully satisfied, not only from the nature of the telegraph but from the experience of other roads, that there is no appendage more valuable in the efficient management of a railroad than a telegraph line, and we have come to the conclusion to submit you this proposition.

"1. To furnish and erect the posts from Atlanta to Chattanooga which shall be 24 feet long with four inches in diameter at the little end, and to be planted four feet in the ground.

"2. To grant you the use of our right of way for the telegraph company, and to pass your officers and material along the road free of charge.

"3. For and in consideration of the foregoing, the W. & A. R. R. is to receive the sum of five thousand dollars to be placed to its credit upon the books of the Telegraph Company, and instead of interest on that sum, it is to receive dividends as they may be declared from time to time, and to be represented in the meetings of the company to that amount by the Chief Engineer, or such other person as may be appointed to represent the same.

"4. And in further consideration of the foregoing services and grant, all the telegraph offices between Atlanta and Nashville erected by the Company shall be subject to the use of said road free of charge, and said company shall erect as many offices as the road may require in addition to the regular offices of the Company but the latter shall [fol. 874] be at the expense of the road.

"Yours respectfully, William L. Mitchell, Chief Engineer.

"Mr. David W. Garst and Mr. James M. Bean, Atlanta, Ga."

"Atlanta, Oct. 11, 1850.

"SIR: We hereby accept the proposition submitted in yours of this date.

"Yours respectfully, D. W. Garst, J. M. Bean.

"W. L. Mitchell, Esq., Chief Engineer, &c., Atlanta, Ga."

In the sixth section of the act which the legislature attempted to ratify there is no statement whatever as to the purport, scope, or provisions of the alleged contract. How, therefore, does it appear from the act that the legislature knew anything as to the terms of this contract and how could they know that there was in this contract an agreement on the part of the State relating to a right of way, or easement, or franchise, or how could they know that embodied in the contract was an agreement that the State would take \$5,000.00 worth of stock in the Augusta, Atlanta and Nashville Magnetic Telegraph Co.? The contract as set forth would be void for indefiniteness of description unless the terms of the contract are set forth in the act so that not only the General Assembly but also every member of the general public who are presumed to know the law can be apprised [fol. 875] that the contract referred to is part of the law which the public is required to know. In the act of 1852, *supra*, which according to its caption is merely an act to incorporate the Augusta, Atlanta & Nashville Magnetic Telegraph Co., there is included, without the knowledge of the public, a provision that the State of Georgia is granting a definite right of way or easement which shall encumber its right of way for all time, when the caption does not even indicate that the line which the company intends to build will follow its right of way or that it may not be several miles away from various portions of its right of way; because it is geographically possible to build a telegraph line from Atlanta to Nashville without even passing Chattanooga, Kingston, Marietta, and hundreds of other points along the actual right of way.

The plaintiff in error seeks to draw a distinction between its rights in Tennessee and those as related to the portion of its line in the State of Georgia, contending that, in any event, it cannot be deprived of its right to use that portion of the line of the Western & Atlantic Railroad which is within the State of Tennessee. The privilege of making surveys in Tennessee was conferred "upon the State of Georgia." Acts of Tennessee Jan. 24, 1838, Cobb's Digest p. 420. The right to construct in Tennessee was given to the "State of Georgia to be enjoyed and exercised by that State." Acts of Tennessee, February 3, 1848, Cobb's Digest p. 421. Thus it will be seen that the grant from the State of Tennessee to the State of Georgia was without words of limitation. This being so, the Telegraph Company will not be heard to question the capacity in which the State of Georgia acquired these powers from the State of Tennessee, and [fol. 876] certainly this court will not supply words of limitation upon that capacity where none was demanded by our sister state. The State of Tennessee at least recognized that Georgia was building the road as a sovereign state and that it was to own the right of way acquired by it, with the permission of the sister state, in its sovereign capacity and for this reason we think the same rule which has been applied as to the claim of right of way or easement or franchise by the plaintiff in error as to the portion of the line in Georgia is likewise applicable to Tennessee. The cases that are cited to sustain the proposition that a State may sometimes divest itself of its sovereign capacity and be reduced to the lower level of partnership in business

undertakings is not applicable in this case because the State of Georgia has not, and never has had, joint ownership in the Western & Atlantic Railroad with any person or corporation. Further, the fact that a sovereign State may engage in a business does not necessarily deprive it of its sovereign governmental characteristics or powers where the business is used as a means of carrying out one of the important prerogatives and duties of government. It is a matter of history that the main and controlling reason why the State of Georgia determined to build the Western & Atlantic Railroad was not a matter of profit, but a matter of transportation for the benefit of all its citizens—to give the people of Georgia the benefit of water transportation from Ross' Landing, by way of the Tennessee, Ohio and Mississippi Rivers, not only with the grain fields of the West, but with the coal fields of Pennsylvania and Ohio. Provision for safe, cheap and convenient transportation is the exercise of a legitimate governmental function, and for this reason we reject the argument that the cases cited from several jurisdictions to sustain [fol. 877] the proposition that the building and operation of the Western & Atlantic Railroad altered the status of Georgia as a sovereign State and reduced her to the same position in regard to this enterprise as she would have occupied as an individual.

3. But even if we were to concede that the verdict was not demanded by reason of the invalidity of the act incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company, the plaintiff in error could under no view of the evidence adduced have maintained its claim to a franchise as against the State of Georgia upon the ground of prescription, as it contended, under color of title and open, notorious peaceable, adverse possession for a period of seven years. But the evidence in this case entirely fails to establish the existence of the statutory period of seven years. Conceding for the sake of argument but not admitting, that the evidence shows that Bean & Garst erected their telegraph lines (though it does not appear that they had erected anything at that time) by erecting a telegraph line in 1857 and taking their possession to that of Hammett's, who purchased from the A. A. & N. M. T. Co., that the M. T. Co., was in possession until the passage of the act adopting the code of 1861, and that the period of time amounts to only a little over four years. Upon the adoption of the code their possession was legally interrupted just as completely and effectively as though they had been ejected by a sheriff under a writ of possession issued upon a judgment in ejectment. Conceding for the sake of argument that they were rightfully in possession under some claim of right there was not a sufficient length of time in which such possession existed as could ripen a prescriptive title. What we have said is upon the assumption that it be admitted that prescription can [fol. 878] ripen against the sovereign State and that the statute of limitations can be applied to a commonwealth, neither of which we do admit. Of course any such proposition as that a sovereign State can be barred by the statute of limitations is denied by the well known maxim *nullus tempus occurrit regi*. As we understand prior

decisions of this court the application of that ancient maxim has been frequently affirmed. Of course an exception to this rule is recognized where the State does consent to be bound by a statute of limitations, or to admit the existence of title by prescription under proper facts as existing in a particular case, but there is no evidence in this record that shows the existence of such a condition.

I am authorized to state that Mr. Justice Hill and Mr. Justice Gilbert concur in the views herein expressed.

The judgment of the trial court having been affirmed on the main bill of exceptions, all the justices concur in a judgment dismissing the cross bill of exceptions.

[fol. 879]

## GEORGIA SUPREME COURT

### DISSENTING OPINION

CUSTER, Judge: The State of Georgia, as owner of the Western & Atlantic Railroad, and the Nashville, Chattanooga & St. Louis Railway, as lessee from the State of the Western & Atlantic Railroad, operating said railroad under the corporate name of Western & Atlantic Railroad, brought their equitable petition against the Western Union Telegraph Company, alleging in substance that the State is the sole and exclusive owner of the railroad, together with its right of way and properties, extending from Atlanta, Georgia, through certain counties named, to Chattanooga, Tennessee. That all of the property appertaining to said railroad, including its right of way and terminals, is exclusively owned by the State, directly and immediately, in its sovereign or governmental capacity: the railroad has never been incorporated, has no capital stock and does not constitute a legal entity; but is public property and the income derived therefrom constitutes a part of the public revenue, and is, under the laws of the State, devoted to public use: alleging further that the Telegraph Company is maintaining and operating over, upon and along the right of way of the Western & Atlantic Railroad, between Atlanta and Chattanooga, telegraph lines, poles, wires, etc., employed by it in the conduct of its business: that the use and occupation of said right of way is without authority from the State, contrary to the will and consent of the lessee, and constitutes an unlawful encroachment upon the right of way and an adverse use thereof. The continued use of said right of way by the Telegraph Company is in derogation of the State's right and title thereto, operates adversely to the rights and interests of the lessee, in the full use and enjoyment of the right of way, and being without warrant of law constitutes a continuing and a constantly recurring grievance.

The prayers of the petition were, in part:  
[fol. 880] For a decree declaring the Telegraph Company to be without lawful right or authority to use and occupy any portion of



the right of way of the Western and Atlantic Railroad, and commanding it to desist from such use and occupation.

That the Telegraph Company be perpetually enjoined from the use and occupancy of any part of said right of way, for the conduct of its business or maintenance of its poles, etc., and from any entry upon or act of trespass on said right of way incident to or in connection with the operation and conduct of its business; and from in anywise disturbing or interfering with the free and unrestricted possession and use of the right of way by the State and its lessee.

In its answer the defendant admitted that the railroad was constructed by the State from Atlanta to Chattanooga, but neither admitted nor denied that it was constructed solely out of public funds. It denied that the State was the owner in fee simple of the land, through and over which the railroad was constructed. It admitted that the State owned the Western & Atlantic Railroad and the easements or rights of way necessary therefor, but denied that the lines of defendant upon, along or over said right of way or the lands or easements taken therefor belonged to the State, but alleged that said lines, land and easements were and had for a long time been in the exclusive and adverse possession of the defendant. It denied that the railroad, including its right of way and terminals, is owned by the State in its sovereign governmental capacity.

Defendant admitted that it is maintaining and operating over, upon or along "what is known as the right of way of the Western & Atlantic Railroad," between Atlanta and Chattanooga, telegraph lines, poles, wires, etc., and claimed that it had continuously so [fol. 881] owned, maintained and operated the same, with the easements and interests in land necessary therefor, from about June 12, 1866 to the present time, and that its predecessors in title had done so from the first construction about 1850.

The defendant then described the location and character of its lines of poles and wires, which it stated were "situate upon or along the said Western & Atlantic Railroad and its right of way," the poles being stated to be situate on the average of about 22 feet from the nearest rail of the main line track of the railroad; and it averred that the easements claimed to be possessed, used and operated by it and its predecessors in title were irrevocable, perpetual and assignable easements or rights "in, upon, through, over and across the Western & Atlantic Railroad and its right of way."

Several acts of the General Assembly were pleaded under which defendant claimed the right to maintain the line as now operated.

Further, it set up that on October 10, 1850, Garst and Bean, who proposed to organize a corporation and build a telegraph line from Atlanta to Nashville, subsequently made to embrace the Georgia Railroad and extend to Augusta, made known the proposal to the Chief Engineer of the Western & Atlantic Railroad, expressing a desire to procure the aid of the said railroad in the construction of a line of telegraph by a corporation to be called the Augusta, Atlanta and Nashville Magnetic Telegraph Company. Thereupon, W. L. Mitchell, said Chief Engineer, on October 11, 1850, wrote to them a letter offering to grant to them for purposes mentioned an ease-



ment on the right of way of the Western & Atlantic Railroad "without limit and perpetual in its nature," which proposition and offer was accepted by them on October 11, 1850, and thereupon said Mitchell issued instructions for the carrying out of the contract so made.

[fol. 882] That by the Act of the General Assembly of Georgia of January 27, 1852, the State incorporated the Augusta, Atlanta & Nashville Magnetic Telegraph Company to do business from Augusta through Atlanta to Nashville, with the usual power of corporations; and in the Act expressly ratified the contract last above mentioned and expressly enacted that said Telegraph Company "shall have power and authority to set up their fixtures along and across any high road or high roads; and any railroad which now or may hereafter belong to this State and any water or water courses of this State." that under this contract and statute the first line of telegraph upon and along the Western & Atlantic Railroad was constructed, and said Telegraph Company was thereby granted and acquired perpetual irrevocable and assignable easements for the construction, maintenance and operation thereof.

The defendant then set forth a series of conveyances and transactions by which it became the successor in title to the original Magnetic Telegraph Company.

At the hearing a motion in the nature of a demurrer to strike numerous paragraphs of defendant's answer and amendments to its answer, was submitted. Certain of these grounds were overruled by the court, but many of them were sustained. To the rulings of the court sustaining the motion to strike the defendant excepted by exceptions pendente lite. The jury trying the case returned a verdict for the plaintiff. A motion for a new trial was made by the defendant, which was overruled, and it excepted to the judgment overruling its motion.

Conceding that the property involved in this controversy including the railroad, its right of way and terminals, is exclusively owned by the State in its sovereign or governmental capacity, we do not think that the conclusion reached by the Justices who are in favor of affirming the decision of the court below is sound. It [fol. 883] is unnecessary to discuss the large number of subsidiary questions which are raised by the exceptions to the rulings upon pleadings and exceptions to the rulings made pending the trial. The holding of the trial judge, in effect, with which three of the Justices of this court agree that the property involved here was held by the State in its sovereign and governmental capacity, that neither the Statute of Limitations nor prescription operated against the State, and that the State lost none of its rights by laches, is conclusive as against the defendant, unless the defendant obtained the easement which is claimed in its answer by virtue of the contract between W. L. Mitchell, Chief Engineer of the Western & Atlantic Railroad while operated by the State and Garst & Bean, entered into on the 11th day of October, 1850. If this contract was a binding contract upon the State, then the right to use the right of way of the Western & Atlantic Railroad was conveyed and granted to the Telegraph

Company, together with certain privileges and appurtenances which it is not necessary to refer to. The controlling question in passing upon the court's ruling upon the pleadings in this case is whether that contract was executed in such a way as to make it binding upon the State and the other parties thereto. The contract consists of a proposal or offer in the following words, and its acceptance:

"Chief Engineer's Office, W. & A. R. R.

Atlanta, Oct. 11, 1850.

GENTLEMEN: I have given much reflection to the subject of your note of yesterday, and I have had full and free conversations with His Excellency Geo. W. Towns, upon the subject, and we are fully satisfied, not only from the nature of the telegraph but from the experience of other roads, that there is no appendage more valuable in the efficient management of a railroad than a telegraph line, [fol. 884] and we have come to the conclusion to submit to you this proposition.

1. To furnish and erect the posts from Atlanta to Chattanooga which shall be 24 feet long with four inches in diameter at the little end, and be planted four feet in the ground.

2. To grant you the use of our right of way for the telegraph company, and to pass your offices and materials along the road free of charge.

3. For and in consideration of the foregoing the W. & A. R. R. is to receive the sum of five thousand dollars, to be placed to its credit upon the books of the Telegraph Company, and instead of interest on that sum, it is to receive dividends as they may be declared from time to time, and to be represented in the meetings of the company to that amount by the Chief Engineer, or such other person as may be appointed to represent the same.

4. And in further consideration of the foregoing services and grant, all the telegraph offices between Atlanta and Nashville erected by the company shall be subject to the use of said railroad free of charge, and said company shall erect as many offices as the road may require in addition to the regular offices of the company but the latter shall be at the expense of the road.

Yours respectfully, Wm. L. Mitchell, Chief Engineer.

To Mr. David W. Garst and Mr. James M. Bean, Atlanta, Ga."

This proposal in the form of a letter was written and submitted on October 11, 1850, and on the same day Garst and Bean, to whom the letter was directed, accepted the proposal made in the following words:

"Atlanta, Oct. 11, 1850.

SIR: We hereby accept the proposition submitted in yours of this date.

Yours respectfully, D. W. Garst, J. M. Bean.

[fol. 885] To W. L. Mitchell, Esq., Chief Engineer, etc., Atlanta, Ga."

If Mitchell had the right and authority to execute such a contract as this as an agent of the State, the proposal and the acceptance of it gave to the Telegraph Company for whom Garst and Bean were acting an easement over the right of way of the Western & Atlantic Railroad. But even if Mitchell was not vested with authority to conclude such a contract,—and we do not mean to rule nor intimate that he was—if the contract was afterwards approved and duly ratified by the General Assembly of this State, which did have the authority to grant and convey such an easement, then the contract became binding upon the State.

On the 27th of January, 1852, the General Assembly of the State of Georgia passed an act entitled "An Act to incorporate the Augusta, Atlanta and Nashville Magnetic Telegraph Company." By certain sections of this Act the General Assembly incorporated the Augusta, Atlanta and Nashville Magnetic Telegraph Company, the company for whom Garst and Bean had been acting as agents or promoters when the contract between them and Mitchell, above set forth, was entered into. In this Act of incorporation is the following: "Section 6. And be it further enacted, That the contract entered into on the eleventh day of October, 1850, by William L. Mitchell, Chief Engineer of the Western and Atlantic Railroad, and D. W. Garst and J. M. Bean, on the part of said Company, be and the same is hereby ratified and affirmed, and that at every election, each share shall entitle its holder to one vote, and absent stockholders may vote by agent or proxy, on producing written authority so to do. And in case of an equal number of votes on both sides, the election shall be decided by lot, and the Chief Engineer of said Railroad, [fol. 886] or other officer having the chief control of said Road for the time being, shall by himself, or his proxy duly authorized, cast the vote to which the State is entitled under said contract." This section of the Act is an approval and complete ratification of the contract entered into between Mitchell and Garst & Bean, and from the date of its ratification, if not from the date of the contract, had the effect of granting to the Telegraph Company the franchise which permitted it to maintain and operate a telegraph line over the right of way of the Western and Atlantic Railroad.

It is contended that the section of the Act last referred to did not have the effect of ratifying and making valid the contract between Mitchell and Garst and Bean. One ground upon which this contention is based is that the section of the Act relating to this contract is not sufficiently explicit; that it does not show that the particular contract under consideration and which we have insisted above was adopted and ratified, is the contract referred to. Surely this conten-

tion must fall upon a mature consideration of the terms of the contract and the Act ratifying it. It is true that the Act does not set out all of the terms of the contract, but it sufficiently describes it to identify it and to make clear the fact that the intention of the legislature was to ratify the contract as contained in the proposal and acceptance. It describes the contract as "that contract entered into on the 11th day of October, 1850 by William L. Mitchell, Chief Engineer of the Western & Atlantic Railroad, and D. W. Garst and J. M. Bean on the part of said company." There is no suggestion in the evidence anywhere that there was any other contract to which this could refer; and there is no suggestion that there was ever any [fol. 887] other contract between Mitchell and Garst and Bean. It is true the Act in this section refers to "said company", without naming it, but in other parts of the Act the Act incorporating the Telegraph Company shows, beyond peradventure, the company to which it refers and identifies it as the Magnetic Telegraph Company. With these facts before us and no facts upon which to base any other suggestion, it seems to us established beyond a doubt that the contract ratified and approved is the contract which we have set out above, and under which the easement was granted.

But it is also urged upon the part of the plaintiffs that section 6 of the Act is unconstitutional, in that it contains "matter different from what is expressed in the title thereof." We are of the opinion that this contention is without merit. The title of the Act is, "An Act to incorporate the Augusta, Atlanta and Nashville Magnetic Telegraph Company." Can it be doubted that under that title it was competent for the legislature to embrace matters relating to the capital, shares, organization, officers of the company and their authority; to make provisions for authority to connect with other lines, and provide that it might run along or across highways; handle dispatches sent over the lines; that it should be penalized for neglect; that the operators should be exempt from certain jury and militia duty, etc.? It does deal with all of these subjects, and there is no suggestion that the title was not broad enough to cover all of these matters. But section 6 of the Act declares that a certain contract shall be ratified, and that is the very contract that made the existence of the company most feasible and possible, and the plan for bringing into existence the telegraph line feasible. That provision in the charter affirming the contract has a natural relation to the subject [fol. 888] matter of the Act. It was not foreign matter, so it seems to us, upon considering the purpose of the Act and the subject-matter of this section; and a similar opinion was entertained by this court and laid down as a correct principle in the solution of a question almost identical with this in principle. In the case of *Goldsmith v. Rome R. R. Co.*, 62 Ga. 473, it was said: "An Act incorporating a railroad company need not express in its title any of the powers, rights, privileges or immunities which the charter is intended to confer. The charter of a private corporation is a contract as between the State and the corporation; and the stipulations, terms and conditions of a contract are to be looked for in the body of the instrument, not in the title or caption." In the course of the opinion in that case

it was also said: "It seems to me that an application of the foregoing points and principles to the case at bar, will render it clear that a clause in the charter of a railroad company exempting its stock from taxation, or fixing a rate of taxation to which it shall be liable, or prescribing a particular mode of taxing it, does not contain matter different from, or inconsistent with, what is expressed in the title of 'An act to incorporate it.' What do we mean by an act 'to incorporate' a railroad company? Suppose a bill to be entitled 'An Act to incorporate the Rome Railroad Company' should be offered in the legislature, what would the legislators present understand such a bill to be? What would they think was intended by it? What is expressed in the title of that sort of a bill? In legal parlance, it means that the author of the bill proposes to make an artificial person, or to create a corporation for the purpose of constructing and operating a railroad, and to clothe it with such attributes and powers, and impose upon it such duties and liabilities, and to grant it such privileges and [fol. 889] immunities, as in the judgment of the legislature will be necessary, or proper, or appropriate for such enterprise. The very nature of a corporation indicates that such is a correct view of the objects and scope of an act of incorporation. All corporations are incorporated, and whilst there are some attributes and powers common to all, yet some have powers that others do not have. Some corporations have privileges and immunities that others do not have. Some corporations enjoy exemptions, and even monopolies, that others do not. Yet, they are all corporations, and all have been 'incorporated.' The act by which they are incorporated is usually called a charter, and we look to the charter of a corporation to find its attributes, its powers, its privileges, its immunities, and its exemptions, for the charter contains the grant and the measure of them all. If the corporation claims a right, a privilege, or an exemption, we look to its charter, the act incorporating it, and if it be found there, we yield to it the right, privilege, or exemption claimed; but if it be not so nominated in the charter, the claim is denied. I undertake here to assert, that the legislature of Georgia never passed 'an act to incorporate' any company, in the title of which the attributes, powers, rights, liabilities, privileges, immunities and exemptions of the company were expressed; and yet all these have been granted and conferred upon corporations by their charters, under the simple title of 'an act to incorporate' the company." This last quotation was used in the case of *Goldsmith v. Rome Railroad Company* by Justice Bleckley, who quoted it from the opinion of the learned trial judge of the case, but quotes it with entire approval; and it covers and adjudicates in principle the question which we are called upon here to decide. [fol. 890] Under the views here expressed, the court below erred in striking, upon motion of the plaintiffs, the part of the defendant's answer which set up the grant of an easement along the Western & Atlantic Railroad by express contract, subsequently ratified by the legislature. We are of the opinion that this part of the answer set up a valid defense to the suit as brought by the plaintiffs, and the defendant should have been allowed to support the allegations of this part of the answer by proof, and it should have been allowed to de-

raign its title through successive conveyances from the Magnetic Telegraph Company to itself; and the court erred in striking those parts of the answer which indicated its chain of title.

What we have said above is directed, of course, to the question as to whether the court erred in sustaining the demurrers to the portions of the defendant's answer and the amendments thereto. We have pointed out that in our opinion the court erred in sustaining the demurrers to certain portions of the answer and the amendments thereto which contain the main ground of the defense. In sustaining the demurrer to those portions of the answer and the amendments thereto indicated above, the court cut the ground from under the defendant's feet. And while we are of the opinion that upon several questions the court erred in its rulings adverse to the defendant, it is unnecessary to take these up in detail, because the rulings upon the main grounds were controlling.

We have not discussed the grounds of the motion for a new trial, because, being of the opinion that the court erred in sustaining the demurrers to portions of the answer and amendments, we are further of the opinion that all that took place subsequently on the trial was [fol. 891] nugatory. The answer of the defendant, including portions thereof that were erroneously stricken, set up a good defense to the State's case; and we differ with the three of our brethren who are in favor of affirming the judgment of the court below, in toto, upon the assertion that upon the case as a whole a verdict for the plaintiff was demanded.

Upon the question as to whether or not prescription would ripen against the State, or the lapse of time could be made the basis of prescription, or as to whether the State lost its right to assert title to any part of its right of way by laches, we concur in the ruling made by the members of the court in favor of affirmance, but not in all that is said by them in the discussion of the question.

In maintaining that a reversal by this court is required by the errors of the court below, we plant ourselves upon the proposition that in parts of the plea and amendments stricken the defendant showed a right to the easement contested, by grant; that is, under the contract between Mitchell and Garst & Bean, as affirmed and ratified by the General Assembly. And we think that the transmission of this title through successive conveyances to this defendant could be shown in the way indicated in defendant's answer. The facts and circumstances pleaded should have been left for the consideration of the jury; and we are of the opinion that in view of those facts and circumstances pleaded, as well as the documents introduced which bore upon the question of title, the jury would have been authorized to find against the State: especially in view of the one monumental, towering, dominating fact, that this defendant and its predecessors in title has for nearly three quarters of a century been in the peaceable enjoyment of the easement, the right to which is now denied it. If in any case a grant should be [fol. 892] presumed, it should be presumed in favor of this defendant under the facts alleged and proved in this record. For the reasons stated and for others which it is not necessary to discuss, we



differ with the opinion of the other three Justices and the learned trial judge

I am authorized to say that Presiding Justice Beck and Justice Atkinson concur with me in the foregoing views and opinion, in which we differ with the three Justices who are in favor of affirming the judgment of the court below.

---

[fol. 893] SUPREME COURT OF GEORGIA, MARCH TERM, 1923

[Title omitted]

PETITION FOR REHEARING AND ORDER DENYING SAME—Filed Sept. 19, 1923

To the Honorable the Supreme Court of Georgia and the Justices thereof:

Now comes the Western Union Telegraph Company, plaintiff in error in the above cause, during the term at which the judgment of the Supreme Court of Georgia in the above case was rendered, and before the remittitur in said case has been forwarded to the Clerk of the trial court, and moves for a rehearing of the above cause, and that, pending the judgment upon this petition, the remittitur of the Supreme Court be not issued or forwarded to the trial court, and that the decision and judgment rendered in the above cause be set aside and reversed or modified, upon the following grounds:

1. The decision of Chief Justice Russell, concurred in by Justices Hill and Gilbert, holds that Section 6 of the "Act to incorporate the Augusta, Atlanta & Nashville Magnetic Telegraph Company" is unconstitutional and void, because containing matter different from what is expressed in the title thereof. Section 6 of this Act, which the trial judge permitted to be introduced in evidence, ratifies the contract of October 11, 1850, between Wm. L. Mitchell, Chief Engineer of the Western & Atlantic Railroad, and Garst & Bean. [fol. 894] In so deciding, this decision does not cite and overlooks a former unanimous decision of this Honorable Court, by a full bench, which has never been reversed or set aside. *Goldsmith vs. Rome Railroad Co.*, 62 Ga., 473. That decision construed an act entitled "An Act to incorporate the Memphis Branch Railroad & Steamboat Co.," and the clause of the charter claimed to be matter different from that which is expressed in the title is "And that its stock shall not be liable to any tax, duty or imposition whatever, unless such, and no more, as is now in bank of this State." (62 Ga., 477.) The Court held that this clause of the Act did not contain matter differing from what is expressed in the title. The decision adjudicated "the following points and principles as well settled: 1. The provision of the constitution which we are now considering, was inserted in the fundamental law of our state, in order



to protect the people against sinister, selfish and fraudulent legislation by requiring that the title of every act should indicate the subject upon which it was intended to legislate, so that neither legislators nor people should be misled or entrapped by the title of a bill, as they were in the matter of the act under which the celebrated Yazoo fraud was perpetrated. 2. It never was intended, by such a provision, that the title of an act should contain a synopsis of the act, or embody all the distinct features or provisions of the statute in detail. To so construe that clause of the constitution as to require this, would, in effect, obliterate from the statute book many of our best and most wholesome laws. 3. It would be improper to give to constitutional provisions of this kind a too rigorous and technical construction; for if, in applying them, we should follow the rules of a nice and fastidious verbal criticism, we would often frustrate the action of the legislature without fulfilling the intention of the framers of the constitution. 4. In the cases before our supreme court, in which they have held statutes to be unconstitutional, because they contained 'matter different from what was expressed in the title thereof,' the court has also held, that if the title of the acts have been general, or if the title, after designating a particular [fol. 895] object, had added, 'and for other purposes,' the construction would have been different, and the statutes would have been held to be constitutional. This point is especially stated in 12 Ga., 36, and in 30 Ga., 679. Indeed, it will appear from an examination of the statutes and digests of this state, that some of the most important laws now in force in Georgia, laws upon which we depend for the protection and security of our dearest rights, were passed by the legislature and approved by the governors, under indefinite titles like the following: 'An act supplementary to the judiciary act,' without indicating the supplementary matter; 'An act to alter the law in relation to lapsed legacies,' without expressing the alteration intended; 'An act in addition to the acts concerning the guardianship of minors,' without indicating the branch of the subject to be added to, or the addition sought to be made to it; 'An act explanatory of several judiciary laws of this state,' without informing the legislators of the explanatory matter, but leaving them to hunt for it in the body of the bill. I give these as examples of indefinite titles, that do not express the matter embodied in the acts to which they relate, and the examples might be multiplied indefinitely. It seems to me that an application of the foregoing points and principles to the case at bar, will render it clear that a clause in the charter of a railroad company exempting its stock from taxation, or fixing a rate of taxation to which it shall be liable, or prescribing a particular mode of taxing it, does not contain matter different from, or inconsistent with, what is expressed in the title of "An act to incorporate it." What do we mean by an act 'to incorporate' a railroad company? Suppose a bill to be entitled 'An act to incorporate the Rome Railroad Company' should be offered in the legislature, what would the legislators present understand such a bill to be? What would they think was intended by it? What is expressed in the title of that sort of a bill? In legal parlance, it means that the

author of the bill proposes to make an artificial person, or to create a corporation for the purpose of constructing and operating a railroad, and to clothe it with such attributes and powers, and impose [fol. 896] upon it such duties and liabilities, and to grant it such privileges and immunities, as in the judgment of the legislature will be necessary, or proper, or appropriate for such an enterprise. The very nature of a corporation indicates that such is a correct view of the objects and scope of an act of incorporation. All corporations are incorporated, and whilst there are some attributes and powers common to all, yet some have powers that others do not have. Some corporations have privileges and immunities that others do not have. Some corporations enjoy exemptions, and even monopolies, that others do not. Yet, they are all corporations, and all have been 'incorporated.' The act by which they are incorporated is usually called a charter, and we look to the charter of a corporation to find its attributes, its powers, its privileges, its immunities, and its exemptions, for the charter contains the grant and the measure of them all. If the corporation claims a right, a privilege, or an exemption, we look to its charter, the act incorporating it, and if it be found there, we yield to it the right, privilege, or exemption claimed; but if it be not so nominated in the charter, the claim is denied. I undertake here to assert, that the legislature of Georgia never passed 'an act to incorporate' any company, in the title of which the attributes, powers, rights, liabilities, privileges, immunities and exemptions of the company were expressed; and yet all these have been granted and conferred upon corporations by their charters, under the simple title of 'an act to incorporate' the company. Under that title, and nothing more, the legislature has incorporated railroads, and vested in them the right to take and appropriate the private property of the citizens of the state; granted them monopolies by declaring that no parallel road shall be built within twenty miles of their track; exempted them from taxation, or fixed the rate at which they should be taxed; given them power to construct branch roads, and conferred upon them other important privileges and immunities, about which nothing was specified in the title of the act of incorporation. All these grants of powers and privileges have been deemed a part and parcel of the work of incorporation, and when the legislature is engaged in doing these things for a company, they are incorporating it, and are not doing something different from an act of incorporation. Hence, an act to incorporate the 'Rome Railroad Company,' is to give it a corporate existence, to give it perpetual life, to enable it to exercise the right of eminent domain, and if, in the judgment of the legislature, the enterprise in which it is about to engage will be of benefit and advantage to the public, by opening up lines of commerce and travel, to foster and encourage the enterprise, and by way of inducing individuals to embark in it, to declare that the road shall be protected against rival lines, and that the capital invested in it shall be exempt from taxation, or that it shall only be taxed to a specified extent, and to give the company any other right, or impose upon it any duty, which is not variant from, or inconsistent with, the object and design of its creation. For

the definition of a corporation, which I have kept constantly in view, in this opinion, I refer you to *Kyd on Corporations*, 13; 4 *Wheaton*, U. S. Rep., 636; and *Angel & Ames on Corporations*, p. 1, Sec. 2, pp. 3 and 4, Sec. 6. The view which I have presented of acts of incorporation, and the titles of such acts, is in perfect harmony with the opinions and practice of the government in all of its departments, for scores of years past. These acts have been passed at different times by legislatures which numbered amongst their members some of the best lawyers Georgia ever knew. They were criticised and approved by governors of acknowledged ability, whilst the judicial and professional mind of the state has acquiesced in their validity with uncommon unanimity, and I feel constrained to follow in the path which they have illumined with their learning."

To the same effect is the unanimous decision by a full bench of *Goldsmith vs. Augusta & Savannah R. R. Co.*, 62 Ga. 468.

The Court has overlooked the unanimous decision by a full bench of *Bonner vs. Milledgeville Ry. Co.*, 123 Ga., 115, the 1st headnote of which is:

"An act to incorporate a named railroad company, 'and to define its right, powers, and privileges, and for other purposes,' is not [fol. 898] unconstitutional as containing matter different from that expressed in its title, or as relating to more than one subject-matter, because in the body of the act it is provided that the corporation shall have the right to construct and equip such lines or routes as have already or may hereafter be agreed upon and contracted for' by the corporators and the municipal authorities of the city in which the line is to be constructed, and that 'the use and enjoyment of so much of the public streets of said city as has heretofore been granted to said corporators by (the municipal authorities) is hereby confirmed in and unto the said corporation.'"

On page 116 of this decision the court said:

"The fact that reference is made to a grant of privileges by the city to the corporators of the company at a time when the city had no legislative authority to make the grant does not alter the principle involved or make the act unconstitutional; for it was clearly within the power of the General Assembly to ratify and confirm what had already been done by the city, regardless of the city's authority to do it at the time. This ratification was germane to the general subject of defining the rights and privileges of the company being incorporated, and so the act was not objectionable as referring to more than one subject matter."

The Court has also overlooked its former unanimous decision by a full bench, *Davis vs. Bank of Fulton*, 31 Ga., page 69, where the Court, in discussing the charter of a bank, uses this language:

"3. The 11th section of the Charter of the Bank of Fulton is not unconstitutional, as 'containing matter in the body of the Act dif-

ferent from what is expressed in the title thereof.' Had a section been incorporated in this Charter, altering the General Law, in regard to the joinder of drawers, endorsers and acceptors of bills so negotiated, or meant to be negotiated in Bank, the exception would have been well taken. But under the title 'An Act to incorporate the Bank of Fulton,' no grant, or privilege, or franchise, necessary or proper to a Banking Institution, is matter different from what is expressed in the title. The 11th section is but the grant of such a [fol. 899] privilege."

Each of the foregoing decisions were rendered by a full bench, and were concurred in by all of the justices.

Apparently the Court has overlooked the provision of Article 7 of the Constitution of Georgia, embodied in Code, Paragraph 6207:

"A decision rendered by the Supreme Court prior to the first day of January, 1897, and concurred in by three judges, or Justices, can not be reversed or materially changed except by the concurrence of at least five Justices. Unanimous decisions rendered after said date by a full bench of six shall not be overruled or materially modified except with the concurrence of six Justices, and then after argument had, in which the decision, by permission of the court, is expressly questioned and reviewed; and after such argument, the court in its decision shall state distinctly whether it affirms, reverses, or changes such decision."

The Court has also overlooked the following unanimous decisions of this Court, by a full bench, holding that decisions of the character mentioned in said constitutional provisions have the force and effect of a statute until reversed or modified in the manner provided. *Heard vs. Russell*, 59 Ga., 25, 54; *Lucas vs. Lucas*, 30 Ga. 191; *Fidelity Co. vs. Nesbit*, 119 Ga., 316, 325.

The decision of Justice Russell, concurred in by Judges Gilbert and Hill, holds in effect, that the title of the act incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company does not suggest to the Legislature, and that the Legislature was without knowledge of, Section 6, thereof, ratifying the Garst & Bean contract.

Section 12 of the Act of 1836, authorizing the construction of the Western Atlantic Railroad (Acts of 1836, page 218), provides that the Chief Engineer of the Western & Atlantic Railroad shall make quarterly reports to the Governor of Georgia, who shall cause the same to be printed and published for the information of the public. [fol. 900] The amending Act of 1837 (Acts of 1837), page 211, Section 4, provides for three commissioners to perform the duties formerly placed on the Chief Engineer, and provides that these commissioners shall make quarterly reports to the Governor, who shall publish the same for the information of the public.

The amending Act of December 22, 1843, vested in the Governor and Chief Engineer the duties and rights formerly vested in the commissioners and in other officials.

The Garst & Bean contract and the report of Chief Engineer

Mitchell set forth as "Exhibit 1" in the amended answer, and as an exhibit to Paragraph 12 thereof, are taken from the printed report of the Chief Engineer to Governor Towns, and are of file in the State Library. This is the first evidence introduced by defendant.

Petitioner respectfully submits that the justices have overlooked the foregoing statutes and their requirements, and that the presumption is that this report of the Chief Engineer, printed by direction of the statute, for the information of the public, was known to the members of the General Assembly of Georgia at the time of the passage of the Act of 1852, incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company and ratifying the contract then made with Garst & Bean.

Neither of the decisions above cited in 62 Ga., 123 Ga., or 31 Ga. have been reversed or set aside; the principles of law enunciated therein now have the force of a statute and are binding upon this Court.

2. Both the decisions rendered by this Honorable Court fail to notice, or to pass upon, Section 9 of the Act of January 27, 1852, above mentioned incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company. Section 9 provided, "That the Augusta, Atlanta & Nashville Magnetic Telegraph Company shall have the power and authority to set up their fixtures along and across any highroad or highroads; and any railroad which now or may here-[fol. 901] after belong to this State."

Section 9 of said Act was pleaded by the Western Union Telegraph Company as one of its muniments of title, and as a grant from the State of Georgia to its predecessor in title of the easement now possessed and enjoyed by it. This was never stricken from defendant's plea.

The plaintiffs in the trial court did not move to strike this allegation in defense. In Paragraph 13 of their motion to strike amended pleas, plaintiffs sought to strike Paragraph 9 of said Act, but that motion was overruled and the Act itself was introduced in evidence and is embodied in the brief of evidence.

The Garst & Bean contract and the report of Mitchell, as Chief Engineer of the W. & A. Railroad, and the testimony of McDonald, (record, page 584), all show that the construction and operation of this telegraph line along and upon the Western & Atlantic Railroad was essential to the proper, safe and economical operation of the Western & Atlantic Railroad.

The ruling of Judge Pendleton in admitting Section 9 of the Act incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company as a muniment of title and as a valid grant, is the law of this case, unless his decision is reversed by this Court. The defendant having the right, under Judge Pendleton's decision, to claim under this grant as one of lawful force, necessarily had the right to prove the construction of lines occupying and using that easement by its predecessors in title, and continued use in them, and passing from them to the defendant, and upon that evidence a jury, and not a judge, should pass. Even an expression of opinion by a judge as to

the effect of that evidence would be ground for a new trial; and more so a judgment of the Court invading the province of a jury and passing upon issues and questions of fact and the evidence thereon in this case.

3. The decision rendered by Chief Justice Russell, and concurred in by Justices Gilbert and Hill, does not pass upon the validity and [fol. 902] effect of the Garst & Bean contract, disassociated from its ratification by the act incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company. The decision of the other justices does not adjudicate its validity or invalidity, thought not conceding its validity.

Petitioner respectfully submits that this Court has lost sight of the following facts embodied in the record of the cause;

The Act of December 23, 1837, record page 530, 531 appointing commissioners with the duties, with the advice of the Engineer in Chief, to generally superintend the railroad, and to do such things as were essential, and having the powers of the superintendent, under the Act of December 21, 1836, record page 527 to 529, and,

Have overlooked the Act of December 4, 1841, giving the Chief Engineer and Disbursing Agent the powers previously exercised by the commissioners, subject to the decision of the Governor, in case of disagreement, record page 536, and,

Have overlooked the Act of December 22, 1843, vesting in the Governor and Chief Engineer the powers previously vested in the commissioners, or in the Governor and commissioners, or in the Chief Engineer and Disbursing Agent, or in the Governor and Chief Engineer.

Apparently the Court has lost sight of the fact that the Garst & Bean contract, made by Mitchell, Chief Engineer, was approved by the Governor when he approved the Act of January 27, 1852, which incorporated the Augusta, Atlanta & Nashville Magnetic Telegraph Company, with Section 6 therein ratifying and approving that contract. If this Act, as an act, is invalid for any reason, as an act of the Legislature, it is valid as an act on the part of the Governor, ratifying and adopting the Garst & Bean Contract. That contract was thereby made not only by the Chief Engineer, but by the Governor as well. The contract, therefore, irrespective of any ratification by the Legislature, is a valid contract and a valid grant. The defendant was entitled to show construction of telegraph lines and [fol. 903] possession thereof, and enjoyment of easements therefor by its predecessors in title and in itself. The evidence offered for that purpose was for the jury, and should have been submitted to it.

4. The Court and all of the justices have apparently lost sight of the grant by the State of Georgia to the Western Union Telegraph Company of "perpetual right of way to erect and maintain telegraph lines along said railroad (Western & Atlantic Railroad) of as many wires as it may deem necessary to its business, and additional lines of poles whenever the said party of the first part (Western Union Telegraph Company) shall so elect." This grant in perpetuity was accomplished by a contract dated August 18, 1870, between the West-



ern Union Telegraph Company and the Superintendent of the Western & Atlantic Railroad, and Rufus Bullock, as Governor. Record page 467 et seq.

That contract was authorized by the Act of January 18, 1852, and particularly Section 3 thereof, making it "the duty of Superintendent of the Western & Atlantic Railroad to conduct all of the operations of the road connected with its construction, equipment and management \* \* \* He shall also contract for and purchase machinery, cars, material, workshops and all other things necessary and proper for the construction, repair and equipment of the road and its general working and business; but all contracts and expenditures which exceed the sum of \$5,000.00, shall be subject to the approval of the Governor."

5. The Court and all of its justices seem also to have lost sight of the resolutions of the General Assembly of October 22, 1887, (Ga. Laws 1887, page 911); the resolutions of December 19, 1893, (Laws 1893, page 501); resolution of December 18, 1894, (Laws 1894, page 283), directing an examination into the facts and circumstances [fol. 904] of the above mentioned contract of August 18, 1870, and directing its rescission, if ground therefor be found; the examination into encroachments upon the right of way of the Western & Atlantic Railroad, and to make settlement on fair and equitable terms; and to investigate all matters pertaining to the Western & Atlantic Railroad, its rights of way and properties, and to consider all writings, papers and documents, whether admissible under the strict rules of law or not, and to give such force and effect as the commission may deem proper, with direction that any judgment or decree shall be so molded in each case as to give effect to all of the rights and equities of the parties and subject matter.

The Court seems to have also overlooked the decision in *Howell vs. State*, 71 Ga., 224, to the effect that the practice of the various departments, as a means of collateral interpretation, is not to be rejected by the Courts in passing upon the constitutionality of a law, but should receive consideration and weight.

6. The following is a portion of the decision of this Court, concurred in, as petitioner understand, by all of the Justices:

"3. Under the doctrine of *nullus tempus occurrit regi*, adverse possession as against the State of Georgia cannot provide the basis for a prescriptive title; and the State is not affected by a statute of limitations unless it expressly consents to be held subject thereto."

That portion of the decision applies, as petitioner understands it, equally to land and right-of-way of the Western & Atlantic Railroad in Georgia and in the State of Tennessee.

In so holding your petitioner believes that this Honorable Court has overlooked the difference between the sovereignty of the State of Georgia within its own domain and its sovereignty in operating a railroad within the sovereignty of Tennessee and its domain, and the [fol. 905] following decisions of the Supreme Court of Tennessee to the effect that the State of Georgia, in owning and operating the



Western & Atlantic Railroad in the State of Tennessee, does so in the capacity of a private citizen and not as a sovereign; and that rules of law applicable to land, title to land and to title by adverse possession and prescriptive title apply against the State of Georgia, owning and operating the Western & Atlantic Railroad, in the same manner as against private citizens; and have overlooked the statute of Tennessee under which title to land and easements are acquired in the State of Tennessee by adverse possession and prescriptive title, and particularly the following decisions of the Supreme Court of Tennessee and the following statutes of that State:

An Act by the General Assembly of Tennessee, (Acts of 1837, Chap. 221, pp. 319, 320): An Act of the Legislature of Tennessee, (Chap. 195 of the Acts of 1847), and Sections 2763, 2764, and 2765 of the Code of Tennessee, being exhibits 10, 11, and 12 attached to the original answer of defendant, and offered in evidence, duly proven; *Railroad vs. Donovan*, 104 Tenn., 465-477; *Morris vs. State*, 87 Tenn., 725, (our original brief, page 68).

*Shelby County vs. Rickford*, 102 Tenn., 402, (our original brief, page 69).

*Tappan vs. W. & A. R. R. Co.*, 3 Lea, 106 (Tenn.).

*W. & A. R. R. vs. Taylor*, 6 Heisk, 408 (Tenn.).

*Hotchkinson vs. W. & A. R. R.* 6 Heisk, 634 (Tenn.).

The Court has also lost sight of the full faith and credit clause of the Constitution of the United States (Ga. Code, Par. 6672), making it mandatory upon this Court to give full faith and credit to the statutes and decisions of Tennessee as to the character of the State of Georgia in the State of Tennessee, as an owner of land and easements or property in that State.

[fol. 906] 7. This Honorable Court, in its decision, held:

"(b) The plea of laches is not available as against a sovereign State. The State cannot be guilty of negligence or any other similar act involving the omission to perform a duty devolving upon an ordinary citizen."

In so holding, petitioner respectfully submits that the Court has lost sight of Georgia Code, Paragraphs 4369 and 4371, to-wit:

"4369. The limitations herein provided apply equally to all courts; and in addition to the above, courts of equity may interpose an equitable bar, whenever, from the lapse of time and laches of the complainant, it would be inequitable to allow a party to enforce his legal rights.

"4371. Limitations to Operate Against the State.—When, by the provisions of the foregoing sections, a private person would be barred of his rights, the State shall be barred of her rights under the same circumstances."

The last mentioned ruling of this Honorable Court applies, as petitioner understand- it, equally as to the conduct of the State of Georgia within its own domain and also within the domain of the sovereign State of Tennessee; and in so doing has overlooked the above mentioned decision of the Supreme Court of Tennessee to the opposite effect, and the above mentioned provision of the Constitution of the United States, Ga., Code, Par. 6672.

8. The decisions of Chief Justice Russell, concurred in by Justices Gilbert and Hill, seem to have overlooked the statement in the report of the Chief Engineer, attached to defendant's amendment to answer as an exhibit to Paragraph XII, that, "I have had full and free conversations with His Excellency George W. Towns upon the subject, and we are fully satisfied, not only from the nature of the telegraph but from the experience of other roads, that there is no [fol. 907] appendage more valuable in the efficient management of a railroad than a telegraph line, and we have come to the conclusion to submit to you this proposition."

This statement is followed by the contract offered to Garst & Bean, under which the use of the telegraph line is assured to the Western & Atlantic Railroad, and, following the acceptance of the contract, is the following statement in the Chief Engineer's letter to the Governor:

"Whereupon I passed an order, that so soon as the telegraph company is sufficiently organized to warrant the undertaking, the Resident Engineer and Roadmaster make all the necessary arrangements for carrying out our part of the foregoing contract; but we did not commence planting the posts till last May, and from a desire to economize as much as possible and do the work with our repairing parties so as not to interrupt their regular duties, the work has progressed slowly, but all the posts have been delivered and half or more are planted, and the wire stretched beyond Kingston. Telegraph offices have been established at Atlanta, Marietta, Cartersville, and Kingston, and a branch line has been established from Kingston to Rome and an office placed there.

"Our Outlay of money for this job has been but little beyond the cost of the posts, and they have been delivered at fifteen cents apiece. We expect the line to be in working order as far as Chattanooga in a month or two more, when we expect to be able to infuse additional efficiency in the management and render the anxiety felt for the tardy trains less painful."

And the testimony of McDonald, a witness for one of the defendants and its Chief Engineer, that in the year 1870 and prior thereto a line of telegraph along the Western & Atlantic Railroad was "indispensable to the successful and expeditious handling of trains. It became an absolute necessity as soon as the telegraph was invented and found practicable. Record, page 584.

It is apparent from the Chief Engineer's report and from McDonald's testimony that the use of the telegraph line was essential

[fol. 908] to the operation of the Western & Atlantic Railroad, and that the Western & Atlantic Railroad and the State of Georgia have, since its construction in the year 1850 or 1851, enjoyed the benefits and fruits of that telegraph line, under the several contracts of Garst & Bean, the Act of 1852, and the contract of 1870, above mentioned; and the legislative committees appointed to investigate this contract and all encroachments upon the right of way, and to accord full equities and rights to all persons, without exacting as proof only such evidence as the law would ordinarily permit, have never reported in favor of the re-cission of the contract of 1870 or the removal of this line of telegraph as an encroachment upon the right of way of the State. The resolutions referred to are those hereinabove mentioned, of the years 1887, 1893 and 1894.

9. Justices Russell, Hill and Gilbert have, in their decision, held:

(a) "It is not to be denied that in this action the plaintiff must recover upon the strength of its title and not upon the weakness of the title of the Western Union Telegraph Company.

(b) "Of the fact that the State of Georgia is the owner of the Western & Atlantic Railroad, the lower Court could properly take judicial cognizance and no proof was acquired to establish the State's ownership."

Petitioner respectfully submits that these holdings are in conflict, the one with the other, and it does not follow therefrom, as these justices held, as petitioner understands their decision, that it was not incumbent upon the plaintiff to prove any title, but the burden rested upon the defendant to disprove plaintiff's title and to prove its own title.

The three justices last mentioned also held:

"There can be no question that the State is the owner of the right of way of the Western & Atlantic Railroad and has been its owner [fol. 909] since the first beginning of the undertaking and from the time when the State invested its first dollar in the enterprise. It is immaterial whether the ownership is in fee or only an easement."

In so holding, the decision seems to have decided that the State of Georgia owned a railroad right-of-way only, and not the land, and all interest in the land upon which that right-of-way is situate. The petition only alleges ownership of railroad right-of-way.

In holding that "it is immaterial whether the ownership is in fee or only an easement," the word "fee" being used in the decision, as petitioner understand- it, to mean land and all interest in land, sight seems to have been lost of the unanimous decisions of this Court adjudicating the difference between railroad right-of-way and land and all interest in land, and adjudicating the character and quality of interest in land, which is known by the term "railroad right-of-way."

The decisions referred to are:

G. & F. R. R. vs. Swain, 145 Ga., 817;

L. & N. R. R. Co. vs. Maxey, 139 Ga., 542;  
 S. F. & W. Ry. vs. Postal, 112 Ga., 941;  
 A. C. L. R. R. Co. vs. Postal, 120 Ga. 282;  
 L. & N. R. R. Co. vs. Postal, 143 Ga., 331;  
 A. B. & A. R. R. vs. Coffee Co., 152 Ga. 432;  
 Long vs. Faulkner, 151 Ga., 837;  
 Stewart vs. Garrett, 119 Ga., 386;  
 Nicholson vs. Daffin, 142 Ga., 729;  
 Augusta vs. Bredenberg, 146 Ga., 459.

In so holding, sight has also been lost, apparently, of the decisions of the Supreme Court of Tennessee applicable to Western & Atlantic Railroad right-of-way in the State of Tennessee, which have adjudicated this question differently from the decision of the three justices of this Court last referred to. Those decisions are:

[fol. 910] Railroad vs. Donovan, 104 Tenn., 465, (our original brief, page 80);

Ry. Co. v. Telfords Exors., 89 Tenn., 293, (our original brief, page 80).

And the Court has apparently lost sight of the provision of the Constitution of the United States (Ga. Code, Par. 6672) requiring full faith and credit to be given the Tennessee decisions and laws.

The decision of the Supreme Court of Tennessee, as to land and railroad right-of-way, and the difference between them, controls as to land and railroad right-of-way within the State of Tennessee.

In holding that "it is immaterial whether the ownership is in fee or only an easement," the decision seems to have overlooked the fact that easements of a different character can concurrently exist in and through the same piece of land; that an easement for a railroad right-of-way may exist over the strip of land of a certain width, and that thereon there may exist at the same time another easement for telegraph lines, their maintenance and operation, and that the one easement does not and may not interfere with the enjoyment of the other easement, which this Court has adjudicated in the following decision, apparently lost sight of:

B. & W. R. R. Co. vs. Wayeross, 91 Ga., 573.

Furthermore, the Court seems to have overlooked the fact that whether an easement for petitioner's telegraph lines may exist upon the land in which the State of Georgia has a railroad right-of-way for its railroad without interfering therewith, is a question of fact to be determined by a jury, and which cannot be, under the laws of Georgia, determined by Judges, or even by the Justices of this Honorable Court.

Respectfully submitted, W. L. Clay, Dorsey, Brewster, Howell & Heyman.

[fol. 911] Now come W. L. Clay and Arthur Heyman, of counsel for the Western Union Telegraph Company, plaintiff in error in the above stated case, and each certify that, upon careful examination

of the opinion of the Court rendered in the above stated cause, he believes the facts, statutes and decisions referred to in the above petition for re-hearing have been overlooked by the Court.

This September 19, 1923.

Arthur Heyman, W. L. Clay.

[File endorsement omitted.]

Motion for rehearing denied Sept. 25, 1923.

[fol. 912]

SUPREME COURT OF GEORGIA

[Title omitted]

AMENDMENT TO PETITION FOR REHEARING—Filed Sept. 24, 1923

Now comes the Plaintiff in Error and with leave of the Court amends its petition for a rehearing of the above cause by adding the following: An act entitled "An Act to incorporate the Gainesville, Jefferson & Southern Railroad Company, and for other purposes therewith connected," was considered by this Court in *Hope vs. Mayor &c.* 72 Ga. 246. The act appears in Georgia Laws 1872 page 333. In the unanimous decision of the court by a full bench it was adjudicated:

The Supreme Court of the United States, 107 U. S. 155, by Harland J., held this language:

"It is not intended by the Constitution of New Jersey that the title to an act should embody a detailed statement, nor be an index or abstract of its contents. The one general object, the creation of an independent municipality, being expressed in its title, the act in question properly embraced all the means or instrumentalities to be employed in *the* accomplishing the object."

"We think these principles are sound, and that an act can not be obnoxious to the objections urged against the act of 1872, when it appears from the whole act that the great purpose and object of the legislature was to create a corporation to lay out and construct a railroad between certain points, and to carry out this object and purpose certain means and instrumentalities were authorized by the act. Yet because the means are provided in the act by which the railroad is to be laid out and constructed and the object of the legislature effected, it is said it renders the act void, as containing more than one subject matter. We do not think so. When it is plain by the [fol. 913] act a certain thing is to be done, any instrumentality authorized by the act in aid of, to conduce to, to assist, the one great purpose of the act is not a different subject matter, but is a part of the main subject-matter: it is a part of the 'substantial unity in the statutable object,' and is not unconstitutional."

"The objections should be serious and the conflict between the statute and the constitution plain and unmistakable before the judiciary should disregard a legislative enactment, upon the ground it embraced more than one object, or if but one object, it was not sufficiently expressed in the title."

In *Morrison vs. Cook* 146 Ga. 570/577, this court said:

"The States ownership of the Western and Atlantic Railroad is a business venture, and in no sense an institution for exercise of governmental functions. In *Western & Atlantic R. Co. v. Carlton*, 28 Ga. 180, it was declared: 'When a State embarks, in an enterprise which is usually carried on by individual persons or companies, it voluntarily waives its sovereign character, and is subject to like regulations with persons engaged in the same calling.' Relatively to such a business the pecuniary interest of the State could no more give public character to the subject of incorporating railroad companies than could the interest of private persons engaged in the same kind of business."

In the last decision Justices Beck, Atkinson, Hill and Gilbert, as well as Justice Evans concurred. Chief Justice Fish was absent.

The foregoing decisions have not been cited to this Honorable Court in this cause, nor have they been referred to. Petitioner believes they have been overlooked, are controlling as authority, and require a different judgment from that rendered.

Dorsey, Brewster, Howell & Heyman, Wm. L. Clay, Attorneys for W. U. T. Co.

[fol. 914] Jurat showing the foregoing was duly sworn to by W. L. Clay and Arthur Heyman omitted in printing.

---

[fol. 915] SUPREME COURT OF GEORGIA, MARCH TERM, 1923

[Title omitted]

NOTICE THAT JUDGMENT IS INVALID—Filed Sept. 27, 1923

To the Honorable the Justices of the Supreme Court of Georgia:

Now comes the Western Union Telegraph Company, plaintiff in error, and, before final decision is rendered in the above cause, makes known to the Court its claim that the decision of Justices Russell, Hill and Gilbert, and by operation of law the divided opinion of the court holding, or sustaining the lower court in holding, that sections six and nine, and each of those sections, of an act of Georgia entitled "An Act to incorporate the Augusta, Atlanta and Nashville Magnetic Telegraph Company," approved Jan. 27, 1852, violates the Constitution of Georgia, and particularly Art. 3, Sec. 7 Par. 8 (Code

par. 6437), and are each of no force or effect, and are invalid, changes a rule of law of this Court and of this State applicable to the contract made by that act, and changes the rule of construction of this Court and of this State applicable to the statute, which is repugnant to the Constitution of the United States, and particularly to Art. 1 Sec. 10 Par. 1 thereof (Ga. Code Par. 6652), and which decision impairs the obligation of a contract contrary to said provision.

Dorsey, Brewster, Howell & Heyman, W. L. Clay, Attorneys  
for Western Union Telegraph Co.

[File endorsement omitted.]

[fol. 916]

GEORGIA SUPREME COURT

CLERK'S CERTIFICATE—Omitted in printing

[fol. 917]

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF  
PARTS OF RECORD TO BE PRINTED—Filed Dec. 17, 1923

The Western Union Telegraph Company, plaintiff in error, within twenty (20) days after the filing of the record in the above cause herewith presents and files the following statement of the points on which it intends to rely, and of the parts of the record which it thinks necessary for the consideration thereof, with proof of the service of the same on defendants in error above named.

The following is a statement of the points on which plaintiff in error intends to rely:

All points made or stated in the Assignment of Error, filed with the petition for writ of error in this cause, a copy of which has been served on defendants in error, are hereby designated and, briefly stated are,

I. The Georgia Act of November 30, 1915 (Ga. Laws 1915, Extraordinary Session, page 119) and the amending act approved August 4, 1916, plead in the petition, violate the Constitution of the United States in that thereby the obligations of the following contracts are impaired.

The contracts made by Georgia with the predecessors in title of the Western Union Telegraph Company, (1) Garst & Bean A. D. 1850, (2) Augusta, Atlanta & Nashville Magnetic Telegraph Company, [fol. 918] A. D. 1852, and (3) the contract made directly by Georgia with the Western Union Telegraph Company dated August 18, 1870.



By each of these contracts Georgia granted perpetual easements along the Western & Atlantic Railroad for the construction, maintenance and operation of the telegraph lines now owned by the Western Union Telegraph Company.

The final decree of the Supreme Court of Georgia gives to said Georgia act of November 30, 1915, and its amendments, such force and effect that the above mentioned contracts are thereby impaired, and enforces that act and its amendments by commanding the Western Union Telegraph Company to remove its said lines of telegraph from the right of way of the Western & Atlantic Railroad and to surrender possession of, and to cease using, the perpetual easements which Georgia granted by the above named contracts.

Thereby the Constitution of the United States Art. 1, Sec. 10, Par. 1, is violated.

II. The lease by Georgia, May 11, 1917, of the Western & Atlantic Railroad to the Nashville, Chattanooga & St. Louis Railway pursuant to the Georgia act of November 30, 1915, plead in the petition, violates the Constitution of the United States in that thereby the obligations of the following contracts are impaired:

The contracts made by Georgia with the predecessors in title of the Western Union Telegraph Company, (1) Garst & Bean A. D. 1850, (2) Augusta, Atlanta & Nashville Magnetic Telegraph Company A. D. 1852, and (3) the contract made directly by Georgia with the Western Union Telegraph Company dated August 18, 1870.

By each of these contracts Georgia granted perpetual easements along the Western & Atlantic Railroad for the construction, maintenance and operation of the telegraph lines now owned by the Western Union Telegraph Company.

The final decree of the Supreme Court of Georgia gives to said lease, such force and effect that the above mentioned contracts are thereby impaired, and enforces that lease by commanding the Western Union Telegraph Company to remove its said lines of telegraph from the right of way of the Western & Atlantic Railroad and to surrender possession of, and to cease using, the perpetual easements [fol. 919] which Georgia granted by the above named contracts.

Thereby the Constitution of the United States, Art. 1, Sec. 10, Par. 1, is violated.

III. Georgia, by the action of its Western & Atlantic Railroad Commission, and particularly its resolution plead in the petition and attached as exhibit 14 to defendant's original answer, violated the Constitution of the United States in that thereby the obligations of the following contracts are impaired:

The contracts made by Georgia with the predecessors in title of the Western Union Telegraph Company, (1) Garst & Bean A. D. 1850, (2) Augusta, Atlanta & Nashville Magnetic Telegraph Company A. D. 1852, and (3) the contract made directly by Georgia with the Western Union Telegraph Company dated August 18, 1870.

By each of these contracts Georgia granted perpetual easements along the Western & Atlantic Railroad for the construction, main-

tenance and operation of the telegraph lines now owned by the Western Union Telegraph Company.

The final decree of the Supreme Court of Georgia gives to the action of the Western & Atlantic Railroad Commission and its said resolution, such force and effect that the above mentioned contracts are thereby impaired, and enforces that action of the Western & Atlantic Railroad Commission and its said resolution by commanding the Western Union Telegraph Company to remove its said lines of telegraph from the right of way of the Western & Atlantic Railroad and to surrender possession of, and to cease using, the perpetual easements which Georgia granted by the above named contracts.

IV. The final decision of the Supreme Court of Georgia has changed a rule of law or construction of statutes by the highest court of Georgia applicable to the contract made with the predecessor in title of the Western Union Telegraph Company, the Augusta, Atlanta & Nashville Magnetic Telegraph Company, by the Georgia act of January 27, 1852, incorporating that telegraph company. Under the rule of law or construction previously established by the Supreme Court of Georgia and applicable to that contract, or charter act, section 6 and section 9 of that act would each have been held to be valid, lawful and not violative of the Constitution of Georgia. [fol. 920] The final judgment of the Supreme Court of Georgia in this cause changes that rule and adjudges section 6 and section 9 of that act, and each of those sections, to be invalid, unlawful and violative of the Constitution of Georgia.

Section 6 of that act ratified Georgia's contract of October 11, 1850, with Garst & Bean, which gave to the latter perpetual easements along the Western & Atlantic Railroad for the telegraph lines now owned and operated by the Western Union Telegraph Company, the successor in title of Garst & Bean.

Section 9 of that act granted perpetual easements to the Augusta, Atlanta & Nashville Magnetic Telegraph Company along the Western & Atlantic Railroad for the telegraph lines now owned and operated by the Western Union Telegraph Company, the successor in title to the Augusta, Atlanta & Nashville Magnetic Telegraph Company.

The effect of the final decision of the Supreme Court of Georgia in this cause, if not reversed by the Supreme Court of the United States, will be to divest the property, title and rights vested in the Western Union Telegraph Company and its predecessors in title under said contract and the law heretofore applicable hereto, which is contrary to the Constitution of the United States and particularly Art. 1, Sec. 10, Par. 1 thereof and the 14th amendment thereto.

V. The decision of the Supreme Court of Georgia is against the title, right, privilege or immunity specially set up or claimed by the Western Union Telegraph Company under the Constitution of the United States and a statute thereof; Georgia has deprived the Western Union Telegraph Company of property without due process of law and has denied to it the equal protection of the laws in violation of the 14th amendment to the Constitution of the United States; and has denied to the Western Union Telegraph Company, and deprives

it of, the title, right, privilege and immunity to which it is entitled by virtue of its acceptance of the Post Roads Act of Congress of July 24, 1866, entitled "An Act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, government and other purposes," in that,

[fol. 921] (a) The decree adjudges that the Georgia act of November 30, 1915, authorized the lease to the N. C. & St. L. Ry., of the easements now used by the Western Union Telegraph Company, which the evidence shows were formerly granted in perpetuity by Georgia to Garst & Bean and to the Augusta, Atlanta & Nashville Magnetic Telegraph Company the predecessor in title of the Western Union Telegraph Company, and which are the same easements which Georgia subsequently in 1870 granted in perpetuity directly to the Western Union Telegraph Company by the contract dated August 18, 1870.

The decree adjudges that Georgia, by its lease of 1917, did lease to the N. C. & St. L. Ry., the easements now used by the Western Union Telegraph Company, and thereby Georgia obligated itself to remove the Western Union Telegraph Company and its lines of telegraph and to place the N. C. & St. L. Ry., in possession of those easements used by the Western Union Telegraph Company for its lines.

The decree adjudges that Georgia, by its said lease act of November 30, 1915, and its amendments, authorized the Western & Atlantic Railroad Commission created thereby to question and attack the title of the Western Union Telegraph Company to the easements used and occupied by it, and to remove its lines of telegraph from the right of way of the Western & Atlantic Railroad.

(b) The decree sustains the findings of the Western & Atlantic Railroad Commission that the telegraph lines of the Western Union Telegraph Company are an unlawful encroachment upon the right of way of the Western & Atlantic Railroad; sustains the finding of that Commission that the Western Union Telegraph Company has no right to maintain or operate those telegraph lines where now located, and does not possess or own the easements necessary therefor; and sustains the finding and determination by the Commission that these telegraph lines must be removed.

These findings by the Commission, plead in the petition, are fully set out in the copy of the resolution of the Commission attached to defendant's original answer as exhibit 14.

These findings and judgments by the Commission, claimed to be pursuant to, and to be authorized by, the act of November 30, 1915, as amended, were without notice to, and without service of any process upon, the Western Union Telegraph Company advising [fol. 922] it of, or calling upon it to be present at, any session or hearing of the Commission to pass upon these questions. Neither said act nor any amendment thereto provides for the giving of any notice to the Western Union Telegraph Company of any hearing or consideration by the Commission of any matter affecting its interest, nor does said act, or any amendment, provide for the serv-

ice of any process upon the Western Union Telegraph Company to appear before said Commission, or to be present at any session of the Commission to pass upon the questions which it did pass upon in its said resolution. No provision is made in said act, or any amendment, to afford the Western Union Telegraph Company an opportunity to be heard by the Commission upon any matters affected by said resolution, or to present its claims and defenses, and to resist the claims of the present lessee made against the Western Union Telegraph Company and its properties and rights. No such opportunity was in fact afforded the Western Union Telegraph Company.

(c) This suit (as shown by the allegations and prayers of the petition) is not a suit to settle and determine claims of right or of title of the Western Union Telegraph Company to easements upon the right of way of the Western & Atlantic Railroad, but is really a suit by Georgia for a judgment and decree to enforce the findings of the Western & Atlantic Railroad Commission as expressed in its said resolution, and to force the Western Union Telegraph Company to remove its lines from the railroad right of way in accordance with the findings of the Commission to enable the present lessee to have and enjoy the easements, properties and rights now possessed and used by the Western Union Telegraph Company, but granted to the N. C. & St. L. Ry. by the present lease.

This is practically what the decree did. Moreover, in the trial resulting in this decree such effect was given to the Georgia lease act of November 30, 1915, to the lease by Georgia, and to the action by Georgia through its Commission, that Georgia and its present lessee, who invoked the machinery of her courts to obtain a decree, were relieved of the burdens and obligations imposed upon suitors in these courts to establish by competent proof their claims, asserted rights and plead title; were relieved of the presumptions against an ordinary suitor, and particularly the presumption [fol. 923] arising upon proof of title out of a plaintiff that the title remains out of that plaintiff until proof that he has again acquired it; and even denials by defendant of allegations of the petition were on the State's motion stricken.

(d) Moreover such force and effect was given to the Georgia lease act of November 30, 1915, and its amendments, to the Georgia lease of 1917, and to the action of Georgia through its Western & Atlantic Railroad Commission, as to cause the court to strike defendant's plea of laches in bar of the claims made, and of the decree sought, under facts alleged in that plea which would bar an individual, notwithstanding the prior Georgia act of 1856 declaring by legislative enactment that the State of Georgia in such cases would be barred. That act has remained of full force and effect from its passage in 1856 to the present time.

(e) Such force and effect was given to the Georgia lease act of 1915, and its amendments, to the Georgia lease of 1917, and to the action of Georgia through its Western & Atlantic Railroad Commis-

sion, that defendant's plea of title by adverse possession under plead statutes of Tennessee for the length of time therein prescribed to make the title of the possessor good was stricken, and that defense denied defendant. The denial by defendant of the allegation of the petition that Georgia owned and operated its railroad in Tennessee in a sovereign capacity, and defendant's assertion that it owned and operated its railroad in Tennessee as a private individual only, with only the rights of, and subject to the law applicable to and against an individual, were stricken, and defendant was deprived of those defenses, notwithstanding the requirements of Art. 4, Sec. 1, Par. 1, of the Constitution of the United States requiring all courts to give full faith and credit to the laws of Tennessee.

(f) Moreover, such force and effect was given to the Georgia lease act of 1915, and its amendments, to the Georgia lease of 1917, and to the action of Georgia through its Western & Atlantic Railroad Commission, that, contrary to the rules of law prevailing and applicable, the action of Georgia through its Western & Atlantic Railroad Commission was enforced without proof that Georgia owned the land on which its right of way is situate, and without proof to establish whether it did so own that land or owned only an easement [fol. 924] in that land for railroad purposes, and, in the latter event, without proof that the easements used by the Western Union Telegraph Company for its telegraph lines interfered with or impaired the easement in the same land of the State of Georgia for railroad purposes. The decree gave the force and effect in this paragraph stated notwithstanding prior decisions of the Supreme Court of Georgia and of the Supreme Court of Tennessee deciding that the railroad is not the owner of the land through which its right of way is situate, but is the owner of a mere easement for railroad purposes only, the ownership of the soil and of the every other use remaining in the individual land owner. These decisions of the Supreme Courts of Georgia and of Tennessee were particularly called to the attention of the Supreme Court of Georgia in the petition of the Western Union Telegraph Company presented to it for a rehearing in this cause.

(g) Such force and effect as given to the Georgia lease act of 1915, and its amendments, to the Georgia lease of 1917, and to the action of Georgia through its Western & Atlantic Railroad Commission, that the easements and interest in land, and the title and properties which had vested in the Western Union Telegraph Company under the laws and constitutions of Georgia under the facts and circumstances plead in defendant's answer, were stricken by the court; defendant was not permitted to prove these facts in evidence, or to establish its plead rights, titles and claims.

(h) The decree deprives the Western Union Telegraph Company of its rights under the said Post Roads Act of Congress of July 24, 1836, and of the rights and title vested in it under that act and under grants from the State of Georgia to itself and its predecessors in title, and the decree of the Supreme Court of Georgia,

if not reversed by the Supreme Court of the United States, will prevent the discharge by the Western Union Telegraph Company of its obligations to the United States incurred and contracted to be performed by its acceptance of the provisions of said Post Roads Act.

The record which the Western Union Telegraph Company thinks necessary for the consideration of the points on which it intends to rely is all of the record specified in the præcipe filed by it with the Clerk of the Supreme Court of Georgia upon the suing out of this writ of error which is a part of the record in this cause, the record [fol. 925] specified being.

1. Original petition with the entry of filing thereof.
2. Original answer and all exhibits thereto with the entry of filing thereof.
3. Plaintiffs' motion to strike original answer and portions thereof with the entry of filing thereof.
4. The order of Judge Pendleton of December 4th, 1920, on the last above motion with the entry of filing thereof.
5. Bill of exceptions pendente lite assigning error on the last above order with the entry of filing thereof.
6. The amendment to the answer of defendant with all exhibits thereto, the first numbered paragraph of this amendment being XII with the entry of filing thereof.
7. The amendment to the defendant's answer with all exhibits thereto, the first numbered paragraph of this amendment being XX with the entry of filing thereof.
8. Plaintiffs' motion to strike from the last above amendments to defendant's answer with the entry of filing thereof.
9. The order on the last mentioned motion rendered June 22nd, 1921, with the entry of filing thereof.
10. Bill of exceptions pendente lite assigning error on the last above mentioned order with the entry of filing thereof.
11. The brief of evidence in said cause and the exhibits thereto, the entry of filing thereof, and the order of the court approving the same.
12. The charge of court and the order approving the same with the entry of filing thereof.
13. The verdict with the entry of filing thereof.
14. The final decree with the entry of filing thereof.
15. Bill of exceptions pendente lite assigning error on the refusal of the court to grant a non-suit, and on the final decree with the entry of filing thereof.



[fol. 926] 16. Original motion for new trial with the entry of filing thereof.

17. Order on motion for new trial dated June 14th, 1922, and the acknowledgement of service of said motion for new trial and of the order thereon endorsed thereon by counsel for plaintiffs, with the entry of filing thereof.

18. Order on motion for new trial dated Sept. 15th, 1922, the assent of counsel for both parties endorsed thereon, with the entry of filing thereof.

19. Order on motion for new trial dated Oct. 14th, 1922, the assent of counsel for both parties endorsed thereon with the entry of filing thereof.

20. Amendment to motion for new trial and all exhibits thereto, the order approving the same, with the entry of filing thereof.

21. Judgment or decision overruling defendant's motion for new trial, with the entry of filing thereof.

22. The signed and certified bill of exceptions in said cause sued out by the Western Union Telegraph Company plaintiff in error, to the Supreme Court of Georgia, together with the date of filing thereof and the acknowledgment of service thereon.

23. The final judgment or decision of the Supreme Court of Georgia in said cause dated September, 1923.

24. The opinion of the Chief Justice of Georgia in said cause concurred in by Associate Justices Hill and Gilbert.

25. The decision of Justice Custer concurred in by Presiding Justice Beck and Associate Justice Atkinson.

26. The petition of the Western Union Telegraph Company, plaintiff in error in said cause, to the Supreme Court of Georgia for a rehearing of said cause by it with a certificate of counsel for petitioners and the entry of filing thereof in the Supreme Court. [fol. 927] 27. The amendment of the Western Union Telegraph Company to said petition for rehearing, with the certificate of counsel and the entry of filing thereof.

28. The claim of the Western Union Telegraph Company filed in the Supreme Court of Georgia and presented to the court before rendition of final decree that the judgment of the court changes a rule of construction which is repugnant to the Constitution of the United States and particularly to Art. 1, Sec. 10, Par. 1, thereof, and impairs the obligations of a contract, with the entry of filing thereof.

29. The final order or judgment of the Supreme Court of Georgia upon said petition of the Western Union Telegraph Company for rehearing.

30. The petition for writ of error.

31. The order allowing the writ of error.

32. The assignment of error.



33. The original writ of error.
34. The original citation with the acknowledgment of service thereon.
35. The supersedeas bond and the entry of approval thereof.
36. Certificate of lodgment of bond and copies of writ of error.
37. The præcipe and the acknowledgment of service thereof.
38. This statement of points upon which plaintiff in error intends to rely and this specification of the record necessary for the consideration thereof with proof of the service of the same on defendants in error.

Francis R. Stark, Arthur Hegman, William L. Clay, Attorneys for Western Union Telegraph Company, Plaintiff in Error.

Due and legal service of the foregoing statement of the points on which the Western Union Telegraph Company, plaintiff in error, intends to rely, and of the parts of the record which it thinks necessary for the consideration thereof is acknowledged. A copy thereof has been received.

Service of the assignments of error filed with its petition for writ [fol. 928] of error in the cause, and receipt of a copy thereof is also acknowledged.

This 15th day of Dec. 1923.

Fitzgerald Hall, Tye, Peebles & Tye, H. C. Peebles, Attys. for Defendants in Error. Hooper Alexander, Atty. for Dfts. in Error.

Plaintiffs in error and defendants in error hereby consent that the præcipe and the foregoing specification of record, necessary for consideration, be amended by striking from each Nos. 18 and 19 thereof, being orders on motion for new trial dated September 15, 1922, and October 14, 1922, which orders merely postpone the hearing on the motion for new trial.

Francis R. Stark, Arthur Heyman, William L. Clay, Attorneys for Plaintiffs in Error. Fitzgerald, Hall, Tye, Peebles & Tye, H. C. Peebles, Hooper Alexander, Attorneys for Defendants in Error.

[fols. 929 & 930] [File endorsement omitted.]

Endorsed on cover: File No. 30,012. Georgia Supreme Court. Term No. 702. Western Union Telegraph Company, plaintiff in error, vs. The State of Georgia as owner of Western & Atlantic Railroad and Nashville, Chattanooga & St. Louis Railway, as lessee, etc. Filed December 17th, 1923. File No. 30,012.

JAN 28 1924

**In the Supreme Court of the United States**

**October Term, 1923**

**WESTERN UNION TELEGRAPH  
COMPANY,**

**Petitioner,**

**vs.**

**STATE OF GEORGIA,**

**As Owner of Western & Atlantic  
Railroad,**

**and**

**NASHVILLE, CHATTANOOGA &  
ST. LOUIS RAILWAY,**

**As Lessee operating said Railroad under  
the corporate name and style of**

**WESTERN & ATLANTIC  
RAILROAD,**

**Respondents.**

**PETITION FOR WRIT OF CERTIORARI  
AND  
BRIEF**

**FRANCIS R. STARK,**  
New York, N. Y.

**ARTHUR HEYMAN,**  
Atlanta, Georgia.

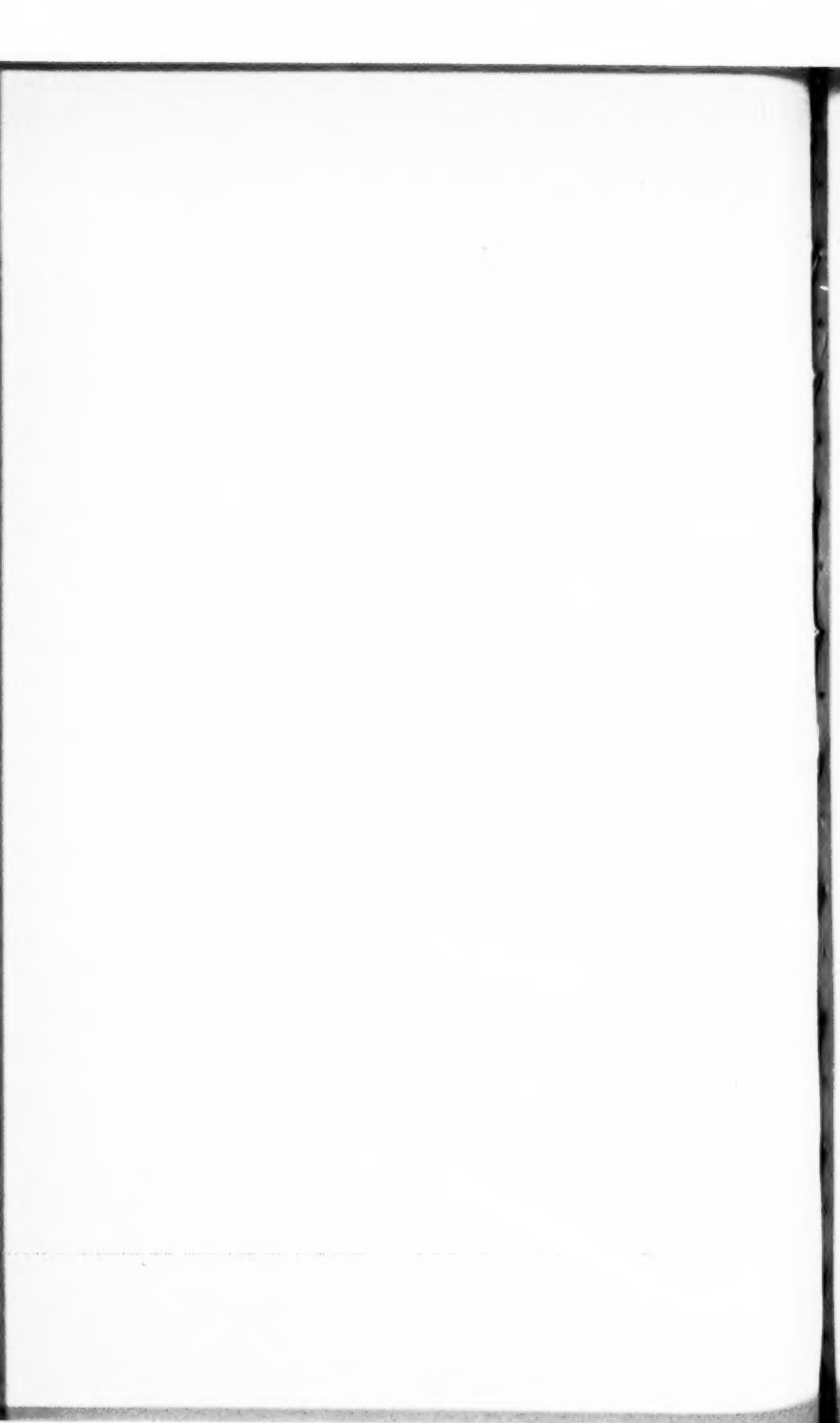
**WILLIAM L. CLAY,**  
Savannah, Georgia.

*Solicitors for Petitioner.*

Office Supreme Court, U. S.  
1925 FILED  
DEC 28 1923  
WM. R. STANSBURY  
CLERK

**No. 70,24**

**24**



## INDEX

---

	PAGE
General Statement of the Case.....	1
Reasons for Allowance of Writ of Certiorari..	12
1. Impairment of Contract .....	12
2. Change in Rule of Construction.....	14
3. Constitutional Right, Title, Privilege or Immunity Denied .....	15
(a) By Present Lease Georgia Grants Easements Previously Given Pe- titioner and Petitioner's Prede- cessors .....	16
(b) Findings of Commission Incon- sistent with Prior Grants and Lack Due Process of Law.....	16
(c) This Suit Is to Remove Petitioner from Easements Previously Granted It and Its Predecessors by Georgia. Due Process of Law Denied .....	17
(d) Defense of Laches Given by Georgia Statute Denied.....	18
(e) Full Faith and Credit Not Given Tennessee Statutes and De- cisions .....	19
(f) Due Process of Law Denied. Plaintiffs Relieved of Burden of Proof. That Burden Placed on Defendant. Decision of Ten- nessee as to Tennessee Land Not Followed .....	19

(g) Title of Petitioner Denied by Act of 1915, Lease and Commission's Action .....	20
(h) Rights Under Post Roads Act Denied .....	21
Petition in Fulton Superior Court.....	25
The Answer .....	27
Georgia Grants .....	29
Laches.....	30
Post Roads Act.....	32
Constitutional Protection Invoked .....	33
Violation of Constitution Plead.....	35
Plea Invoking Constitution.....	39
Material Testimony Admitted and Excluded..	40
The Verdict .....	45
The Decree .....	46
Final Judgment of Georgia Supreme Court..	47
Conflicting Opinions of Justices of Supreme Court of Georgia .....	48
Opinion by Chief Justice Russell.....	48
Opinion by Justice Custer.....	52
Petition for Rehearing .....	54
Denial of Rehearing by Georgia Supreme Court .....	54

## BRIEF

## I.

Impairment of Contract .....	55
------------------------------	----

## II.

Changed Rule of Construction.....	62
-----------------------------------	----

## III.

Due Process of Law Denied .....	63
---------------------------------	----

## EXHIBITS

Exhibit I.—Georgia Act December 29, 1847...	74
Exhibit II.—Garst & Bean Contract 1850.....	74
Exhibit III.—Act Incorporating A. A. & N. M. T. Co., January 27, 1852.....	77
Exhibit IV.—Georgia Statutes Making Laches Operate Against Georgia.....	79
Exhibit V.—Resolution of W. & A. R. R. Com- mission Directing Institution of This Suit	79





IN THE SUPREME COURT OF THE 1  
UNITED STATES

WESTERN UNION TELEGRAPH  
COMPANY,

Petitioner,

*versus*

STATE OF GEORGIA, as Owner of  
Western & Atlantic Railroad,  
and NASHVILLE, CHATTANOOGA  
& ST. LOUIS RAILWAY, as  
Lessees operating said Rail-  
road under the corporate name  
and style of WESTERN &  
ATLANTIC RAILROAD,

Respondents.

2

*To The Honorable, The Supreme Court of the  
United States:*

The petition of the Western Union Telegraph 3  
Company, herein sometimes styled Western Union,  
respectfully shows:

**GENERAL STATEMENT OF THE CASE.**

This suit was brought in the superior court of  
Fulton County, Ga., to remove the petitioner from  
the right of way of the respondents. Petitioner  
appealed to the supreme court of Georgia from  
the decree of the superior court in favor of the re-  
spondents. The decree of the superior court was

affirmed by a divided court, three of the judges voting for affirmance and three for reversal. Under the Georgia law this automatically affirmed the court below. An application for a rehearing was denied by the same vote. **The chief justice of the supreme court of Georgia has allowed a writ of error, and the cause upon said writ is now docketed in this court.**

- 5 The telegraph lines of the petitioner involved in this case were built upwards of sixty years ago, under various grants from the State of Georgia, and under certain contracts with that State, and with corporations and individuals, and more recently under authority of the Post Roads Acts of Congress; and these lines have been continuously in operation since they were constructed. The Western & Atlantic Railroad, upon or along whose right of way from Atlanta, Ga., to Chattanooga, Tenn. the telegraph lines stand, is owned by the State of Georgia, which for a long period itself operated the road, but afterwards leased it to the Nashville, Chattanooga and St. Louis Railway, a corporation of Tennessee, which is now operating the road as lessee.

- 6 In 1915 the Georgia Legislature passed an Act (amended in 1916) creating the Western & Atlantic Railroad Commission, purporting to give that commission power to remove encroachments upon the railroad right of way, and it is under the supposed authority of that Act that this suit is brought.

The petitioner, among other things, contends:

A. That the Georgia Act of 1915, and the amendment thereto, and the action of the State of Georgia through the commission created thereby, and the present lease by the State of Georgia to the Nash-

ville, Chattanooga & St. Louis Railway, impair the contracts between the petitioner, and its predecessors, and the State of Georgia and others in violation of the Constitution of the United States.

B. That said Act, and the amendment thereto, and the action taken thereunder by the State of Georgia through the said Commission, and said lease, deprive the petitioner of property without due process of law, contrary to the Constitution of the United States.

C. That the final decree of the supreme court of Georgia gives to said Act of Georgia, as amended, such force and effect that the various contracts between the State of Georgia and others, and the petitioner, are thereby impaired in violation of the Constitution of the United States. 8

D. That the final decision of the supreme court of Georgia has changed a rule of law or construction of statutes theretofore laid down by the highest court of Georgia, applicable to the contracts theretofore made between the petitioner and the State of Georgia and others, thereby impairing the obligations of said contracts and depriving the petitioner of its property without due process of law, all in violation of the Constitution of the United States. 9

E. That said Act of Georgia of 1915, as amended, and as interpreted by the final decision of the Georgia supreme court, is unconstitutional in that it deprives the petitioner of property outside of the State of Georgia, namely: of its telegraph lines within the State of Tennessee, without due process of law, and in that it fails to give full faith and credit to statutes and decisions of the courts of

Tennessee with respect to the part of the telegraph line within that State.

- 11 The effect of the decree of the highest court of the State, if unreversed, will be to compel the removal of this important trunk line of telegraph, which has been continuously used for more than sixty years in interstate and foreign commerce, and in the transaction of telegraph business for the Government of the United States. The question is therefore one not only affecting the immediate parties, but involving considerations of very considerable public interest. **This writ of certiorari is applied for because of the possible doubt whether, under the Judicial Code, all the Federal questions which exist in the case can be properly presented in this court on the writ of error.**

Georgia and its lessee in their petition claim:

- 12 The State of Georgia in its sovereign and governmental capacity is the owner of the Western & Atlantic Railroad, which was operated by her legislative and executive departments until December 27, 1870. Since that date that railroad has been leased to, and has been operated by, private corporations. The present lease was made December 27, 1919, to the Nashville, Chattanooga & St. Louis Railway.

Telegraph lines of the Western Union Telegraph Company are situate upon the right of way of the Western & Atlantic Railroad unlawfully, without right, and in derogation of the State's right and title. This operates adversely to the rights and interest of the present lessee.

The Georgia Statute of November 30, 1915 (as amended) created the W. & A. R. R. Commission which was given full power and authority to deal with and dispose of all encroachments upon the

right of way of the Western & Atlantic Railroad; to cause the removal and discontinuance thereof; and to institute legal proceedings.

The Western & Atlantic Railroad Commission by resolution found petitioner's telegraph lines to be an unlawful encroachment upon said right of way, and directed the institution of this suit for their removal.

The Western Union Telegraph Company in its answer and plea claims:

The State of Georgia does not own and operate said railroad in its governmental or sovereign capacity either in Georgia or in the State of Tennessee. In embarking in that enterprise and in owning and operating that railroad, Georgia waived her sovereign character in respect thereto, and subjected herself at all times to the laws and regulations applicable to, and binding upon, a private person or private corporation, or ordinary railroad corporation owning, maintaining and operating a railroad, and assumed all of the liabilities and burdens imposed upon a private person or corporation incident to such ownership and business. Title could be acquired to such railroad properties by adverse possession, and by such action or nonaction on the part of Georgia, as would give title against a private person owning a railroad; and Georgia would be barred and estopped from disputing the claims and title of persons or corporations to portions of the right of way and properties of said railroad under circumstances under which a private person or corporation would be barred and estopped. The answer plead decisions of the Supreme Court of Georgia and of the Supreme Court of Tennessee to this effect.

The State of Georgia owned "right of way" for

its railroad; but that right of way was an easement for railroad purposes only—the ownership of the soil and every other use remaining and being in the original land-owner and his assigns.

- Grants of perpetual easements for the lines of telegraph of the Western Union Telegraph Company along the Western & Atlantic Railroad from the State of Georgia to its predecessors in title, and directly to itself, were plead. These grants are specified below in Reasons for Allowance of the Writ of Certiorari, and are, therefore, not more  
 17 fully designated here.

The Georgia Statute of March 6, 1856, still in force, declares the State of Georgia will be barred by laches whenever an individual will be barred. Facts which would bar an individual, and the action of the Legislature of Georgia requiring persons having adverse claims to right of way of that railroad to be treated in an equitable manner, were plead.

The Statute of Limitations of Tennessee and such possession as would create good title thereunder was also plead.

- The Post Roads Act of the United States to aid  
 18 in the construction of telegraph lines, and to secure to the government certain benefits therefrom, was plead.

The affirmative grant and obligations of that statute, coupled with the grant of perpetual easements by the State of Georgia, makes it unlawful for the State of Georgia, its lessee, or the Western Union Telegraph Company, to destroy or abandon these telegraph lines, or defeat the service which that statute requires to be rendered to the United States, which has the right to purchase those lines when it desires as provided in the Post Roads Act.

Title by adverse possession both in Tennessee and in Georgia and such possession as would create good title thereunder were plead.

The Georgia Act of November 30, 1915, Georgia's lease to the N. C. & St. L. Ry., and the action of the W. & A. R. R. Commission, are unconstitutional. If given the force and effect claimed, which the decree in this cause has given them, they violate the Constitution of the United States by impairing the obligations of contracts, and in taking property without due process of law. This violates the United States Constitution, Article 1, Section 10, Paragraph I, and the 14th amendment to that Constitution, and the Western Union Telegraph Company, without due process of law, will be deprived of property, title and rights which had vested in it under the laws of Georgia and of the United States. This defense was expressly plead in paragraphs VI and VIII of the original answer and in the plea set forth in paragraph XXV of the amendment. 20

On motion of Georgia and her lessees, all of the claims and defenses of the Western Union Telegraph Company above stated and plead were stricken. 21

The plea of the Western Union Telegraph Company affirmatively setting up its own title through grants from Georgia to its predecessors in title and deraigned into itself, and the grant from Georgia directly to itself, was stricken in its entirety.

Georgia and her lessee were not required to prove title or to introduce any deeds or muniments of title, notwithstanding testimony of their witnesses that there were such deeds conveying right of way.

The decree adjudges that the easements now



*General Statement of the Case*

22

used and enjoyed by the Western Union Telegraph Company are covered by the present lease from the State of Georgia to the N. C. & St. L. Ry.; and that by that lease Georgia has obligated itself to oust the Western Union Telegraph Company and to deliver these easements into the possession of the N. C. & St. L. Ry.

23

The finding of the Western & Atlantic Railroad Commission that the Western Union Telegraph Company occupies the right of way of the Western & Atlantic Railroad without right and unlawfully was an ex-parte proceeding, no notice of which was given to the Western Union Telegraph Company.

24

The Act creating that Commission made no provision for the giving of notice to, or of the service of any process upon, the Western Union Telegraph Company. It did not create any machinery under which that Company would be afforded an opportunity to appear before that Commission to assert and defend its claims and rights. In these respects the said statute, and the action of the Commission, violate the Constitution of the United States. The decree in this cause enforcing such findings, will, if not reversed, enforce the taking of, and cause to be taken, property of the Western Union Telegraph Company without due process of law.

In the trial of this cause the State of Georgia and her lessee were relieved of the burden of proving their asserted claims; were not required to prove title to right of way; what that right of way was; or whether the easements of the Western Union Telegraph Company did or did not impair or interfere with the easement of the State of Georgia for railroad purposes in the same land. The presumption arising against an ordinary suitor upon

proof of title out of a plaintiff that the title remains out of plaintiff until he has <sup>ac-</sup>acquired it was denied Western Union Telegraph Company.

Plead denials by Western Union Telegraph Company of the allegations of the State and her lessee in their petition were stricken on their motion.

Full force and effect was, contrary to the Constitution of the United States, denied the decisions of the Supreme Court of Tennessee adjudicating that, in owning and operating her railroad in Tennessee, Georgia did not act in a sovereign capacity, but only in the capacity of an ordinary railroad corporation or private person, subject to all the laws applicable thereto.

26

Whether, in Georgia or in Tennessee, Georgia in the ownership and operation of its railroad did or did not act in a sovereign capacity, upon instituting this suit she became subject, as would an ordinary suitor, to the rules of law, processes, practices, the rules of the burden of proof, and to presumptions arising upon proof of certain facts, prevailing in the forum of her court whose processes and rules she invoked. From all of these she and her lessee were nevertheless relieved in the trial of this cause, and the decree therein resulted, not from a trial in which due process of law was accorded to, but in which due process of law was denied, the Western Union Telegraph Company, and particularly in the respects herein above and hereinafter stated.

27

The Supreme Court of Georgia did not pass upon the validity of the grant made by the State of Georgia directly to the Western Union Telegraph Company by contract of August 18, 1870. The decision of the court turned almost exclusively on the validity of the grant of the State of Georgia to

the Augusta, Atlanta & Nashville Magnetic Telegraph Company of the easements now occupied by the Western Union Telegraph Company. The decision of the court turned upon the provision of the then Constitution of Georgia, to wit: "Nor shall any law or ordinance pass containing any matter different from what is expressed in the title thereof."

Justice Custer and two other Justices, citing prior unreversed decisions of the Supreme Court of Georgia by a full bench, held the Georgia Constitution was not violated; that the Act of 1852 granted perpetual easements to the Augusta, Atlanta & Nashville Magnetic Telegraph Company; that the Western Union Telegraph Company should be permitted to prove its title deraigned in its answer and plea, which constituted a good defense; and that "if in any case a grant should be presumed it should be presumed in favor of this defendant under the facts alleged and proved in this record."

These Justices further stated that the decision of the Supreme Court of Georgia cited by them and particularly Goldsmith vs. Rome Railroad Co. 62 Ga. 473, "covers and adjudicates in principle the question which we are called upon here to decide."

Chief Justice Russell and two associate Justices, without commenting upon the Georgia decisions cited by Justice Custer, and without citing any decision of that court, held that the Act of 1852 violated the Georgia Constitution. The Court being evenly divided the judgment of the trial court was affirmed by operation of law. The judgment of the Supreme Court of Georgia affirming the trial court by a divided court was rendered on September 13, 1923.

Endeavor to comply with the rule limiting this

*General Statement of the Case*

31

---

petition to a summary and short statement of the matters involved may have resulted in too great a generalization of statement. For this reason, and to aid the court in an examination of the pleadings and record of this case, which are voluminous, petitioner prefaces its brief hereto attached with a more ample statement of the pleadings, certain evidence introduced or excluded and rulings of the court germane to the claims of violation of the Constitution, and the decisions of the Justices of the Supreme Court of Georgia.

32

**Rehearing duly sought was denied by the  
Supreme Court of Georgia Sept. 29th, 1923**

33

## REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI.

The chief reasons assigned by the Western Union Telegraph Company, your petitioner, for the allowance of the writ of certiorari herein prayed are:

35 The Georgia Act of November 30, 1915, and the amendment thereto, plead in the petition and upon which the suit is based; the action of Georgia through its Western & Atlantic Railroad Commission; and Georgia's lease of the Western & Atlantic Railroad;

(a) Impair contracts previously made by the State of Georgia with the predecessors in title of the Western Union Telegraph Company, and made directly with the Western Union Telegraph Company, contrary to the Constitution of the United States;

36 (b) Take from the Western Union Telegraph Company rights and title to property, which under the laws of Georgia have become fully vested in the Western Union Telegraph Company, and deprive the Western Union Telegraph Company of property without due process of law contrary to the Constitution of the United States.

The foregoing more fully stated, and other reasons, are:

### I.

**Georgia Act of November 30th, 1915, lease of 1917, and action of Commission impair contracts.**

Georgia by the legislative act of November 30, 1915, with its amendment; by her lease of 1917;

and by the action of the Western & Atlantic Railroad Commission, has violated the Constitution of the United States in that thereby the obligations of the following contracts are impaired:

The contracts made by Georgia with the predecessors in title of the Western Union Telegraph Company, (1) with Garst & Bean A. D. 1850, (2) with Augusta, Atlanta & Nashville Magnetic Telegraph Company A. D. 1852, and (3) the contract made directly by Georgia with the Western Union Telegraph Company dated August 18, 1870.

By each of these contracts Georgia granted perpetual easements along the Western & Atlantic Railroad for the construction, maintenance and operation of the telegraph lines now owned by the Western Union Telegraph Company.

The final decree of the Supreme Court of Georgia gives to said Georgia Act of November 30, 1915, and its amendments, to her lease of 1917, and to the action of the W. & A. R. Commission, such force and effect that the above mentioned contracts are thereby impaired; and enforces that act and its amendments, that lease, and the resolution of the W. & A. R. R. Commission, by commanding the Western Union Telegraph Company to remove its said lines of telegraph from the right of way of the Western & Atlantic Railroad, and to surrender possession of, and to cease using, the perpetual easements which Georgia granted by the above named contracts.

Thereby the Constitution of the United States Art. 1, Sec. 10, Par. 1, is violated.

**II.****Change in rule of construction by State Court.**

41      The final decision of the Supreme Court of Georgia has changed a rule of law or construction of statutes by the highest court of Georgia applicable to the contract made with the predecessor in title of the Western Union Telegraph Company by the Georgia act of January 27, 1852, incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company. Under the rule of law or construction previously established by the Supreme Court of Georgia and applicable to that contract, or charter act, section 6 and section 9 of that act would each have been held to be valid, lawful and not violative of the Constitution of Georgia. The final judgment of the Supreme Court of Georgia in this cause changes that rule and adjudges section 6 and section 9 of that act, and each of those sections, to be invalid, unlawful and violative of the Constitution of Georgia.

42      Section 6 of that act ratified Georgia's contract of October 11, 1850, with Garst & Bean, which gave to the latter perpetual easements along the Western & Atlantic Railroad for the telegraph lines now owned and operated by the Western Union Telegraph Company, the successor in title of Garst & Bean.

Section 9 of that act granted perpetual easements to the Augusta, Atlanta & Nashville Magnetic Telegraph Company along the Western & Atlantic Railroad for the telegraph lines now owned and operated by the Western Union Telegraph Company, the successor in title to the



Augusta, Atlanta & Nashville Magnetic Telegraph Company.

The effect of the final decision of the Supreme Court of Georgia in this cause, if not reversed by the Supreme Court of United States, will be to divest the Western Union Telegraph Company of the property, title and rights vested in it and in its predecessors in title under said contract and the law heretofore applicable thereto, which is contrary to the Constitution of the United States and particularly Art. 1, Sec. 10, Par. 1 thereof and the 14th amendment thereto.

44

### III.

#### **Title, right, privilege or immunity claimed under the constitution or statutes of the United States denied.**

The decision of the Supreme Court of Georgia is against the title, right, privilege or immunity specially set up or claimed by the Western Union Telegraph Company under the Constitution of the United States and a statute thereof; Georgia has deprived the Western Union Telegraph Company of property without due process of law, and has denied to it the equal protection of the laws, in violation of the 14th amendment to the Constitution of the United States; and has denied to the Western Union Telegraph Company, and deprives it of, the title, right, privilege and immunity to which it is entitled by virtue of its acceptance of the Post Roads Act of Congress of July 24th, 1866, entitled "An Act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, government and other purposes"; in that,

45

46      *Reasons for Allowance of Writ of Certiorari*

---

(a) The decree adjudges that the Georgia act of November 30, 1915, authorized the lease to the N. C. & St. L. Ry. of the easements now used by the Western Union Telegraph Company, which the evidence shows were formerly granted in perpetuity by Georgia to Garst & Bean and to the Augusta, Atlantic & Nashville Magnetic Telegraph Company, and which are the same easements which Georgia subsequently in 1870 granted in perpetuity directly to the Western Union Telegraph Company by the contract dated August 18, 1870.

47      The decree adjudges that Georgia, by its lease of 1917, did lease to the N. C. & St. L. Ry. the easements now used by the Western Union Telegraph Company, and thereby Georgia obligated herself to remove the Western Union Telegraph Company and its lines of telegraph and to place the N. C. & St. L. Ry. in possession of those easements used by the Western Union Telegraph Company for its lines.

48      The decree adjudges that Georgia, by its said lease act of November 30, 1915, and its amendments, authorized the Western & Atlantic Railroad Commission created thereby to question and attack the title of the Western Union Telegraph Company to the easements used and occupied by it, and to remove its lines of telegraph from the right of way of the Western & Atlantic Railroad.

(b) The decree sustains the findings of the Western & Atlantic Railroad Commission that the telegraph lines of the Western Union Telegraph Company are an unlawful encroachment upon the right of way of the Western & Atlantic Railroad; sustains the finding of that Commission that the Western Union Telegraph Company has no right to maintain or operate those telegraph lines where

now located, and does not possess or own the easements necessary therefor; and sustains the finding and determination by the Commission that these telegraph lines must be removed.

These findings by the Commission, plead in the petition, are fully set out in the copy of the resolution of the Commission attached to defendant's original answer as exhibit 14.

These findings and judgments by the Commission, claimed to be pursuant to and, to be authorized by, the act of November 30, 1915, as amended, were without notice to, and without service of any process upon, the Western Union Telegraph Company advising it of, or calling upon it to be present at, any session or hearing of the Commission to pass upon these questions. Neither said act nor any amendment thereto provides for the giving of any notice to the Western Union Telegraph Company of any hearing or consideration by the Commission of any matter affecting its interest, nor does said act, or any amendment, provide for the service of any process upon the Western Union Telegraph Company to appear before said Commission, or to be present at any session of the Commission to pass upon the questions which it did pass upon in its said resolution. No provision is made in said act, or any amendment, to afford the Western Union Telegraph Company an opportunity to be heard by the Commission upon any matters affected by said resolution, or to present its claims and defenses, and to resist the claims of the present lessee made against the Western Union Telegraph Company and its properties and rights. No such opportunity was in fact afforded the Western Union Telegraph Company.

(c) This suit (as shown by the allegations and

50

51

prayers of the petition) is not a suit to settle and determine claims of right or of title of the Western Union Telegraph Company to easements upon the right of way of the Western & Atlantic Railroad, but is really a suit by Georgia for a judgment and decree to enforce the findings of the Western & Atlantic Railroad Commission as expressed in its said resolution, and to force the Western Union Telegraph Company to remove its lines from the railroad right of way in accordance with the findings of the Commission to enable the present lessee to have and enjoy the easements, properties and rights now possessed and used by the Western Union Telegraph Company, but granted to the N. C. & St. L. Ry., by the present lease.

This is practically what the decree did. Moreover in the trial resulting in this decree such effect was given to the Georgia lease act of November 30, 1915, to the lease by Georgia, and to the action by Georgia through its Commission, that Georgia and its present lessee, who invoked the machinery of her courts to obtain a decree, were relieved of the burdens and obligations imposed upon suitors in these courts to establish by competent proof their claims, asserted rights, and plead title; were relieved of the presumptions against an ordinary suitor, and particularly of the presumption arising, upon proof of title out of a plaintiff, that the title remains out of that plaintiff until proof that he has again acquired it; and even denials by defendant of allegations of the petition were stricken on the motion of the State and its lessee.

(d) Moreover such force and effect was given to the Georgia lease act of November 30, 1915, and its amendments, to the Georgia lease of 1917, and to the action of Georgia through its Western &

Atlantic Railroad Commission, as to cause the court to strike defendant's plea of laches in bar of the claims made and of the decree sought under facts alleged in that plea which would bar an individual, notwithstanding the prior Georgia act of 1856 declaring by legislative enactment that the State of Georgia in such cases would be barred. That act has remained in full force and effect from its passage in 1856 to the present time.

(e) Such force and effect was given to the Georgia lease act of 1915, and its amendments, to the Georgia lease of 1917, and to the action of Georgia through its Western & Atlantic Railroad Commission, that defendant's plea of title by adverse possession under plead statutes of Tennessee for the length of time therein prescribed to make the title of the possessor good was stricken, and that defense denied defendant. The denial by defendant of the allegation of the petition that Georgia owned and operated its railroad in Tennessee in a sovereign capacity, and defendant's assertion that it owned and operated its railroad in Tennessee as a private individual only, with only the rights of, and subject to the law applicable to and against, an individual, were stricken and defendant was deprived of these defenses, notwithstanding the requirements of Art. 4, Sec. 1, Par. 1, of the Constitution of the United States requiring all courts to give full faith and credit to the laws of Tennessee.

(f) Moreover, such force and effect was given to the Georgia lease act of 1915, and its amendments, to the Georgia lease of 1917, and to the action of Georgia through its Western & Atlantic Railroad Commission, that, contrary to the rules of law prevailing and applicable, the action of Georgia

- through its Western & Atlantic Railroad Commission was enforced without proof that Georgia owned the land on which its right of way is situate, and without proof to establish whether it did so own that land or owned only an easement in that land for railroad purposes; and, in the latter event, without proof that the easements used by the Western Union Telegraph Company for its telegraph lines interfered with or impaired the easement of the State of Georgia in the same land for railroad purposes. The decree gave the force and
- 59 effect in this paragraph stated notwithstanding prior decisions of the Supreme Court of Georgia and of the Supreme Court of Tennessee deciding that the owner of a railroad is not the owner of the land through which its right of way is situate, but is the owner of a mere easement for railroad purposes only, the ownership of the soil and of every other use remaining in the individual land owner. These decisions of the Supreme Courts of Georgia and Tennessee were particularly called to the attention of the Supreme Court of Georgia in the petition of the Western Union Telegraph Company presented to it for a rehearing in this cause.
- 60 (g) Such force and effect was given to the Georgia lease act of 1915, and its amendments, to the Georgia lease of 1917, and to the action of Georgia through its Western & Atlantic Railroad Commission, that the court struck so much of the answer as plead the easements and interest in land, and the title and properties which had vested in the Western Union Telegraph Company under the laws and constitutions of Georgia under the facts and circumstances plead. Defendant was not permitted to prove these facts in evidence or to establish its plead rights, titles and claims.

(h) The decree deprives the Western Union Telegraph Company of its rights under the said Post Roads Act of Congress of July 24, 1866, and of the rights and title vested in it under that act and under grants from the State of Georgia to itself and its predecessors in title. The decree of the Supreme Court of Georgia, if not reversed by the Supreme Court of the United States, will prevent the discharge by the Western Union Telegraph Company of its obligations to the United States incurred and contracted to be performed by its acceptance of the provisions of said Post Roads Act. 62

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Supreme Court of Georgia, commanding said Court to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the record and all proceedings of said Supreme Court of Georgia, **or to save expense, as permitted by law, that the certified copy of the record filed with the writ of error in this cause above mentioned be taken and deemed an exhibit hereto, and to be a sufficient return to the writ of certiorari,** to the end that the said cause may be reviewed and determined by this Court as provided by law, and that the petitioner may have such other further relief or remedy in the premises as to this Court may seem proper; and that said decrees of the Supreme Court of Georgia may be reversed by this Honorable Court. In the event this Honorable Court deems that there should be filed a certified copy of the entire transcript of the record of the case including the proceedings in the Supreme Court of 63



Georgia and printed copies thereof additional to those filed in connection with the appeal, that this Court grant an order allowing such reasonable enlargement of time as may be necessary to enable petitioner to have printed and filed in this Court such additional certified copy of the said record and proceedings in said Supreme Court of Georgia, and printed copies thereof as will enable it to comply with the rules and requirements of this Honorable Court, should it deem that your petitioner has not now sufficiently complied therewith.

65

FRANCIS RAYMOND STARK,  
of New York, N. Y.

ARTHUR HEYMAN,  
of Atlanta, Ga.

WILLIAM L. CLAY,  
of Savannah, Ga.

Solicitors for the Western Union Telegraph  
Company, *Petitioner.*

66

State of Georgia, }  
County of Chatham, } ss.:

Personally appeared William L. Clay, who, being duly sworn, says that in the cause herein above stated, he is, and from its inception has been, one of the counsel for the Western Union Telegraph Company, the petitioner, that he with the other counsel signing the foregoing petition prepared the

*Reasons for Allowance of Writ of Certiorari*

67

same, and that the allegations thereof are true as he verily believes.

WILLIAM L. CLAY

Sworn to and subscribed  
before me, this 25 day of  
December A. D. 1923.

*Frederick I. Lantry*  
Notary Public,  
Chatham County,  
Georgia.

To the State of Georgia, as owner of the Western & Atlantic Railroad, and Nashville, Chattanooga & St. Louis Railway, as lessee operating said Railroad under the corporate name and style of Western & Atlantic Railroad, and to their solicitors, Tye, Peeples & Tye, Henry C. Peeples, and Hooper Alexander, Esquires: 68

The Western Union Telegraph Company, petitioner in the foregoing matter, will on Monday,

*January 21<sup>st</sup> 1924,* submit a petition (copy whereof is herewith served upon you) to the Supreme Court of the United States in open Court at the Capitol, Washington D. C., for a writ of certiorari to review the decision and decree of the Supreme Court of Georgia, in the cause therein stated. 69

FRANCIS RAYMOND STARK,  
ARTHUR HEYMAN,  
WILLIAM L. CLAY,

Solicitors for Petitioner.

Service of the foregoing notice, and the receipt

70      *Reasons for Allowance of Writ of Certiorari*

---

of a copy of the petition therein referred to and  
brief hereto attached, is hereby acknowledged this  
26 day of *December*      A. D. 1923.

*Hooper Alexander*

Solicitor for

State of Georgia, as owner of the  
Western & Atlantic Railroad.

*Henry C. Peeples.*

71

Solicitor for

Nashville, Chattanooga & St. Louis  
Railway, as lessee operating said  
Railroad under the corporate name  
and style of Western & Atlantic  
Railroad.

TO

William R. Stansbury, Esquire,

Clerk of the Supreme Court of the United  
States, Washington, D. C.

72      The Western Union Telegraph Company, the  
above named petitioner for a writ of certiorari  
respectfully requests you to submit the foregoing  
petition to the Supreme Court of the United States  
on Monday, *January 21<sup>st</sup> 1924*,  
as permitted by the rules of that Court.

FRANCIS RAYMOND STARK,  
ARTHUR HEYMAN,  
WILLIAM L. CLAY,

Solicitors for the Western Union Telegraph  
Company.

## STATEMENT OF THE CASE AND BRIEF FOR PETITIONER.

73

### THE PETITION IN FULTON SUPERIOR COURT.

The State of Georgia in its own right, and the Nashville, Chattanooga & St. Louis Railway, as lessee of the State of Georgia of the Western & Atlantic Railroad, in their petition in this cause filed in Fulton Superior Court alleged:

74

The State of Georgia in its sovereign and governmental capacity is the owner of the Western & Atlantic Railroad extending from Atlanta, Georgia, to Chattanooga, Tennessee, and all of the property pertaining thereto, including its right of way (Par. 1), and operated the same directly through its legislative and executive departments until December 27, 1870. The railroad was then leased to and has since been operated by, private corporations. The Nashville, Chattanooga & St. Louis Railway, one of the plaintiffs in the cause, is the present lessee and has since December 27, 1919, been in the possession of, and has operated, the railroad. (Par. IV and V).

75

The Western Union Telegraph Company is maintaining and operating upon and along the right of way of this railroad between Atlanta, Georgia, and Chattanooga, Tennessee, telegraph lines and doing business there with without authority from the State of Georgia, and contrary to the will and consent of its present lessee. That use constitutes an unlawful encroachment upon the right of way; is an adverse use thereof; is in derogation of the State's right and title; and operates adversely to

the rights and interest of the present lessee in the full use and enjoyment of that right of way. (Par. VI and VII.)

77

The General Assembly of Georgia by a statute approved November 30, 1915, created the Western & Atlantic Railroad Commission. That statute was amended August 4, 1916. That Commission was given full power and authority to deal with, and dispose of, any and all encroachments upon, and uses and occupancies of, any part of the right of way and properties of the Western & Atlantic Railroad, whether such use and occupancy was permissive or adverse, and whether with or without claim of right. The Commission was authorized and empowered to take such action as it might deem proper and expedient to cause the removal and discontinuance of such use or occupancy, and to this end to institute legal proceedings. (Par. VIII).

78

Paragraph 14 of the present lease reserves to Georgia the right to remove, and cause to be discontinued, any and all encroachments and adverse uses and occupancies upon the right of way and property of that railroad, whether under claim of right or otherwise. To this end the present lessee has consented that the State may withhold delivery of possession or right of possession of such right of way or property as is adversely used and occupied until such encroachments, adverse uses and occupancies have been removed or discontinued. The State may, in such manner as it may deem best, proceed to remove such encroachments, uses and occupancies acting in its own name as the owner of the property, and the present lessee will, upon request, join in such proceeding, judicial or otherwise. (Par. VIII.)

Pursuant to the direction of said statute and in accordance with the provisions of paragraph 14 of the present lease, the Western & Atlantic Railroad Commission on December 27, 1919, adopted a resolution directing its counsel to institute and prosecute in the name and behalf of the State of Georgia, "such suits and legal proceedings as may be appropriate for the removal of said encroachments and the discontinuance of such adverse use by the Western Union Telegraph Company," the present lessee to join therein. Pursuant to this resolution this suit has been brought. (Par. VIII).

80

The petition invoking equity prays:

1. A decree declaring the Western Union Telegraph Company to be without lawful right or authority to use and occupy any portion of the right of way of said railroad; and commanding it to desist from such use and occupancy to the end that plaintiffs may have full and unrestricted use and enjoyment thereof free of any adverse claim by the Western Union Telegraph Company.

2. A decree enjoining the Western Union Telegraph Company and its servants from using and occupying any of the right of way of that railroad, and from interfering with the unrestricted possession and use thereof by plaintiffs.

81

## THE ANSWER.

The defendant denied that the State of Georgia owns and operates that railroad in its governmental or sovereign capacity; and alleged that, in embarking in that enterprise and in owning and operating that railroad, Georgia waived its sovereign character in respect thereto, and subjected

itself at all times to the laws and regulations applicable to, and binding upon, a private person or a private corporation, or ordinary railroad corporation owning, maintaining and operating a railroad, and assumed all of the liabilities and burdens imposed upon a private person or corporation incident to such ownership and business; and alleged that title could be acquired to such railroad properties by adverse possession, and by such action or monaction on the part of Georgia, as would give title against a private person owning a railroad; and that Georgia would be barred and estopped from disputing the claims and title of persons or corporations to portions of the right of way and properties of said railroad under circumstances under which a private person or corporation would be barred or estopped. The answer plead decisions of the Supreme Court of Georgia and of the Supreme Court of Tennessee to this effect. (Par. 1).

83

81

The petition alleged that the State of Georgia owned "right of way" for its railroad. The answer admitted the ownership of such right of way in and through lands as is necessary for the maintenance and operation of that railroad, but expressly denied the ownership by the State of Georgia in the land itself on which this easement is situate, and asserted that the land itself and every interest and easement therein, other than a railroad easement for said railroad, belonged to the original land owner, his heirs or assigns. (Par. 1).

The answer denied ownership by the State of Georgia of the easements enjoyed by defendant and necessary for the construction, maintenance and operation of its lines of telegraph, and alleged that defendant was the owner in fee simple of those easements. (Par. 1).



---

The Western Union Telegraph Company in its answer (Par. VI) alleged the following grants from the State of Georgia to its prececessors in title under which the telegraph lines now owned by it upon or along the Western & Atlantic Railroad right of way were constructed and maintained:

1. The Georgia Act of December 29, 1847, granting telegraph companies the right to construct telegraph lines upon any public road or high way.

2. A contract of October 11, 1850, between Garst & Bean and the chief Engineer of the Western & Atlantic Railroad, granting Garst & Bean the right to construct telegraph lines along the Western & Atlantic Railroad and perpetual easements thereon for the same. 86

3. The Georgia statute of January 27, 1852, incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company. Section 6 of this act ratified the contract with Garst & Bean. Section 9 of the act granted independently perpetual easements to that telegraph company for its telegraph lines along and across any high road or high roads, "and any railroad which now or may hereafter belong to this State." At that time the State of Georgia was the owner of the Western & Atlantic Railroad. 87

The Western Union Telegraph Company in its answer deraigned its title from the Augusta, Atlanta & Nashville Magnetic Telegraph Company.

4. The Western Union Telegraph Company further plead a contract made with it by the State of Georgia dated August 18, 1870, whereby the State of Georgia granted it a "perpetual right of way to

erect and maintain telegraph lines along said railroad of as many wires as it may deem necessary to its business, and additional lines of poles whenever" the Western Union Telegraph Company shall so elect.

89 The preamble of this contract recited that it was made "in order to provide necessary telegraph facilities for the party of the second part (Georgia) and to a better understanding of the terms on which the party of the first part (W. U. T. Co.) shall occupy the line of railroad of the party of the second part with the line or lines of telegraph wires belonging to the party of the first part, and to permanently settle and define the business relations between the respective parties hereto." (Par. VI.)

The answer further alleged litigation between the first lessee and the Western Union Telegraph Company in the year 1872, predicated upon this contract which was upheld by a decision of the Supreme Court of the United States in 91 U. S. 283, and thereafter the first lessee paid to the Western Union Telegraph Company the moneys claimed by it under that contract. (Par. VI.)

90 The answer further alleged that on October 22nd, 1887 (Georgia Laws 1887, page 911) the General Assembly of Georgia requested the Governor to instruct the Attorney General to examine the facts and circumstances connected with said contract and grant of August 18th, 1870, and, if ground existed for the rescinding of that contract, to institute a proceeding for that purpose. No such proceeding has ever been instituted. (Par. VI.)

The answer alleged that no ground existed for rescinding the contract, and claims that in any event the State is now barred by its laches and by

the statutes of limitations from questioning the validity of the contract, and from instituting the present suit, or any proceeding whereby or where-in the validity of that contract may be involved or questioned. (Par. VI.)

The answer further alleged that under the Georgia statute of limitation of March 6, 1856, the State of Georgia was barred of the right to have, or maintain this action. A provision of that act now embodied in Code paragraphs 4369 and 4371 is that the State will be barred when under like circumstances a private person would be barred. (Par. VI).

92

The answer further alleged that joint resolutions of the General Assembly of Georgia, December 19, 1893 (Laws of 1893 page 501) and of December 18, 1894 (Laws of 1894 page 283) recognized adverse possession of lands, rights and properties of the Western & Atlantic Railroad which would ripen into good title and bar the State from claim therein when under like circumstances a private person would be barred. These resolutions provide that "a settlement of each and every case of encroachment, adverse claim, occupation or right held against the interest of the State" shall be effected "in such a manner and on such terms as will be fair and equitable," and "that any judgment or decree rendered in 'finally determining any and all matters of controversy and issues, both of law and fact between the State of Georgia and any person or persons affecting or relating to the Western & Atlantic Railroad, its rights, ways and properties,' 'shall be so moulded in each case as to establish and give effect to all the rights and equities of the parties in the subject matter.'" (Par. VI).

93

The answer further alleged that the State of

Georgia did not own the Western & Atlantic Railroad, or land or right of way, or operate that railroad, in the State of Tennessee, in a sovereign or governmental capacity, but only in the capacity of a private person or of an ordinary private corporation; and that the statutes of Tennessee in respect to adverse possession, limitation of actions, and prescriptive title, plead therein, now barred the plaintiffs of having or maintaining this action. (Par. VI.)

95

The answer further alleged Article 1, Section 8 of the Constitution of the United States empowered Congress to regulate interstate commerce, to establish post roads, to provide for and maintain an army and navy and to do all things necessary therefor, which would include the necessary means of rapid communication. (Par. VI).

96

The answer further alleged the Post Roads Acts of Congress of A. D. 1837, 1853 and 1872, declaring all railroads to be post roads; and plead the Post Roads Act of Congress of July 24th, 1866, "to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes," and the acceptance thereof by the Western Union Telegraph Company in the year 1866, which, by the terms of that statute, placed upon the Western Union Telegraph Company certain burdens and gave to the government certain rights therein enumerated. (Par. VI).

The affirmative grant and obligations of that statute, coupled with the grant of perpetual easements by the State of Georgia, makes it unlawful for the State of Georgia, its lessee, or the Western Union Telegraph Company, to destroy or abandon these telegraph lines, or defeat the service which

that statute requires to be rendered to the United States, which has the right to purchase those lines when it desires as provided in the Post Roads Act. (Par. VI).

The answer admitted that the Western Union Telegraph Company and its predecessors in title have been in adverse possession of said easements along the Western & Atlantic Railroad, but denied that its use and occupancy thereof were unlawful or without right, or that the same constituted a trespass. The answer asserted that under the facts plead therein the Western Union Telegraph Company had title thereto and is entitled to peacefully have and enjoy the same, and to operate its telegraph lines thereon, without any interference from the State of Georgia, its lessee, or any other person. (Par. VI).

98

The answer alleges that any interference by the Nashville, Chattanooga & St. Louis Railway with the Western Union Telegraph Company or its lines of telegraph, and any Georgia statute, law, judgment or decree permitting such interference, or requiring the removal of said lines of telegraph, "will deprive defendant of its lawful rights and properties vested in, and secured to, it by the laws and constitutions of Georgia and of the United States and will be unjust and inequitable to defendant not only because of the facts above alleged, but also under and because of" the great cost of construction and of maintenance for over sixty (60) years without objection by the State of Georgia or any land owner, and because of the interest of the public and of the Government in these lines and in the service they afford. (Par. VI.)

99

Exhibited to the answer is a copy of the resolutions of the Western & Atlantic Railroad Com-

mission, under which this suit has been instituted. That resolution in effect declares the use and occupancy by the Western Union Telegraph Company to be without right and to be an unlawful encroachment; declares this suit "for the removal of said encroachment and the discontinuance of said use is within the purview of said Act of August 4th, 1916, and within the contemplation of paragraph 14 of the new lease contract dated May 11th, 1917"; and directs the institution of this suit for the removal of said encroachment and the discontinuance of said use. (Par. VIII).

101

The answer denied that the Commission has the power and authority claimed for it, and denied that the Governor and Secretary of State had the power to insert in the present lease the provision last mentioned, or to make the claims and assert the rights therein made and asserted, or to contract with respect thereto, and particularly in-so-far as the same relates to the Western Union Telegraph Company and its lines of telegraph and easements. (Par. VIII).

102

In paragraph VIII of its answer the Western Union Telegraph Company denied that the Act of November 30, 1915, or any amendment thereof, gave to the Commission certain specified powers which it understood the Commission and the petitioners claimed, including in particular the right to attack defendant's right to its telegraph lines and easements, to seek to have its title thereto annulled, to have the above grants from the State of Georgia declared ineffective, to remove or interfere with defendant's lines of telegraph, to prevent or defeat defendant's performance of obligations under, and to deprive defendant of the rights,

properties and franchises acquired by it under said act of Congress.

The unconstitutionality of the Georgia Act of 1915 and of the action of the Commission is alleged in the following language:

"Defendant alleges, if the Georgia Act of November 30th, 1915, or any amendment thereto, has the force and effect and delegates the authority herein above denied by this defendant, but which defendant understands to be claimed for it by complainants in this suit and by said Commissioners appointed under said act, then said statute is opposed to the Constitutions of the United States and of Georgia; and in any event the said act and resolution of the Commissioners, and this suit and any judgment or decree of any court giving to said statute the force and effect herein by defendant denied to it, but claimed in this suit by said complainants, and any judgment or decree of any court upholding, giving effect to, or enforcing, said resolution of said Commissioners, and any judgment or decree of any court, granting the prayers of the petition in this cause, will be violative of the Constitutions of Georgia and of the United States in that thereby:

"(a) There will be an impairment of the obligations of contracts by a statute or law passed or made subsequently which violates

"Georgia Constitution Art. 1, Sec. 3, Par. 2.

"United States Constitution Art. 1, Sec. 10, Par. 1.

"(b) The State of Georgia will have made and enforced a law revoking grants of privileges or immunities granted to defendant and its predecessors above alleged in such manner as to work injustice to defendant which violates

104

105



*Defenses Stricken*


---

"Georgia Constitution, Art. 1, Sec. 3, Par. 3.

"(c) The rights, privileges and immunities which as above alleged have vested in, or accrued to, defendant under and by virtue of the acts of the General Assembly of Georgia will not be held inviolate by all courts before whom they may be brought in question, which violates

"Georgia Constitution, Art. 12, Sec. 1, Par. 5.

"(d) Thereby property of defendant will have been taken without due process of law which violates

107 "Georgia Constitution, Art. 1, Sec. 1, Par. 3.

"Georgia Constitution, Art. 1, Sec. 3, Par. 1.

"United States Constitution 14th amendment."

### **Separate Pleas.**

In addition to the foregoing answer defendant filed separate pleas (1) of title by adverse possession; (2) that plaintiffs are barred by the laches of the State; (3) in respect to property in the State of Tennessee plaintiffs are barred because of the statute of limitations of that State.

108 The three affirmative pleas last mentioned were complete only by reference to allegations in the answer, and for that reason was subject to a demurrer which was interposed.

### **DEFENSES STRICKEN.**

On motion of plaintiffs the court struck all of the denials of the answer, and all matters affirmatively alleged in defendant's answer, in denial and in defense, herein above stated, except some of the allegations relating to the letter to Garst & Bean of October 11, 1850; to the act of

January 27, 1852; and a few of the muniments of title plead showing transition of title from Augusta, Atlanta & Nashville Magnetic Telegraph Company into the Western Union Telegraph Company.

Subsequently, upon the filing of an amendment to the answer, all of these allegations without exception were stricken. They are plead in the additional pleas in paragraphs XX, XXI, XXII, XXIII, XXIV of the amendment. Paragraph XX is a plea affirmatively setting up defendant's title based upon the four (4) grants from Georgia above mentioned. 110

Paragraph VIII plead a violation of the Constitutions of the United States and of Georgia and invoked the protection thereof. Grounds 39, 40 and 41 of plaintiffs motion to strike this portion of the answer claimed that the act of November 30, 1915, and its amendment, and the action of the Western & Atlantic Railroad Commission, had the force and power denied by defendant, and asserted that neither the Constitution of Georgia or of the United States were violated thereby, and that a judgment or decree granting the prayers of the petition would not be opposed to the provisions of those constitutions. 111

On motion of plaintiffs, the court struck the three affirmative pleas filed with the answer.

Leave having been given the defendant amended its answer and filed six separate affirmative pleas in paragraphs numbered XX-XXV setting up the following defenses, to wit:

Paragraph XX affirmatively plead the title in defendant. It alleged the several grants from the State of Georgia to its predecessors in title herein above mentioned, and deraigned title there-

*Defenses Stricken*

112

from into itself. In addition defendant plead the grant from Georgia under the contract of August 18, 1870, with defendant.

Paragraph XXI plead the statutes of limitation under the Georgia Act of March 6, 1856.

Paragraph XXII plead in bar prescriptive title to property in Georgia under the statutes of that State, and title by adverse possession against the State of Georgia, and against all persons whomsoever.

113 Paragraph XXIII plead in bar Tennessee statutes of limitation and of prescriptive title as to property in Tennessee.

Paragraph XXIV plead in bar facts substantially the same as those plead in its original answer and stricken, whereby the State of Georgia is barred from having or maintaining this suit because of its laches.

In each of the separate pleas in paragraphs numbered XX, XXI, XXII, XXIII and XXIV, the several grants from the State of Georgia above mentioned are plead in support of each of these several pleas.

114 Each of these pleas were stricken by the court upon plaintiff's motion.

Paragraph XXV of the amendment is a separate and distinct plea alleging that the Act of November 30, 1915, the amendment thereto, the resolution of the Commission and any judgment or decree giving that statute the force claimed in the petition or upholding and enforcing said resolution of said Commission and any judgment granting the prayers of the petition, will violate the Constitutions of Georgia and of the United States in impairing the obligations of contracts, and property will be

*Defenses Stricken*

115

taken from the Western Union Telegraph Company without due process of law in violation of the Constitution of the United States, Art. 1, Sec. 10, Par. 1, and the 14th amendment thereto. This plea is substantially as set forth in the original answer, but in addition specifies the particular contracts claimed to be impaired, to wit:

1. The Georgia Act of December 29, 1847.
2. The contract with Garst & Bean of October 11, 1850.
3. The Georgia Act of January 27, 1852.
4. The contract of August 18, 1870.

116

This plea was stricken on plaintiff's motion, paragraph 59, to wit:

"59. Plaintiffs move to have stricken paragraph XXV of said amendments, because: (1) Neither the Act of November 30, 1915, nor the resolutions of the Western & Atlantic Railroad Commission, copy of which is attached to the original answer of defendant, nor any judgment or decree of this court giving to the said statute the force and effect claimed by plaintiffs in this suit, nor any judgment or decree upholding, giving the effect to or enforcing said resolution, or granting the prayers of the petition, would be violative of the Constitution of Georgia or of the United States, as claimed by defendant. (2) The same allegations were made in the original answer of defendant and were stricken therefrom, on motion of plaintiffs, by order of this court heretofore passed, still existing and unreversed."

117

118 *Some Material Testimony Admitted and Excluded*

---

Exceptions were duly filed to the orders striking portions of the answer, pleas and amendments thereto.

**SOME MATERIAL TESTIMONY ADMITTED AND EXCLUDED.**

119 Plaintiffs introduced in evidence the Statute of Georgia authorizing the construction of the Western & Atlantic Railroad; authorizing the acquisition by the State of Georgia of such right of way as might be necessary therefor, with authority to acquire right of way by condemnation where it could not be procured by contract. The Georgia Statutes introduced in evidence also require the officers charged with the work to act as economically as possible.

120 Hunter MacDonald a witness for the plaintiffs testified that in 1879 he entered the service of the Nashville, Chattanooga & St. Louis Railway; in 1891 he moved to Atlanta and took charge of the Western & Atlantic Railroad as resident engineer, and ever since 1892 he has been chief engineer of the N. C. & St. L. Ry.; that he had been connected with the operation of the Western & Atlantic Railroad continuously for about 40 years in one capacity or another, and that during part of that time he was in charge of its maintenance of way. He also testified that he understood that there are deeds conveying to the State of Georgia a very large part of the right of way of the Western & Atlantic Railroad; that these deeds "give right of way over, or through certain land lots;" that he found it difficult to determine the land mentioned in these right of way deeds. The witness also testified "from

my knowledge of such examination of deeds as I did make I am unable to say whether there are deeds conveying the right of way for the entire length of the line, or whether there are portions of the right of way to which there are no deeds, but which are possessed and held simply by possession."

In addition to the foregoing testimony which the court allowed to go to the jury, the following testimony of McDonald about these deeds was ruled out:

122

"There are deeds that give right of way for the Western & Atlantic Railroad over or through certain land lots; that is nearly all give right of way through my lands in certain land lots, generally calling for a width of 33 feet on each side for railroad purposes. The general character of those deeds is that the landlord generally gives a right of way through his land for 33 feet on each side of the railroad." (Paragraph 11 of motion for new trial).

Notwithstanding the foregoing testimony plaintiffs did not offer to introduce a single deed to right of way or land to show title in the State to land or easements, or to define the character or extent of claimed interest in land.

123

The same witness, Hunter McDonald, also testified "In the year 1870, I should regard a telegraph line along the right of way of a railroad as being indispensable to the successful and expeditious handling of trains. It became an absolute necessity as soon as the telegraph was invented and found practicable. As soon as the applicability of

124 *Some Material Testimony Admitted and Excluded*

---

a telegraph line became apparent for operating trains successfully, it was then recognized as a necessity. Prior to 1880, the telegraph line was necessary to the expeditious and safe operation of a railroad. Telegraph lines along a railroad and between stations of that railroad do give facilities to the railroad to communicate over those lines from station to station as to the movement of trains, and is of great benefit in avoiding dangers and disaster. And the use of these telegraph lines connecting those stations does greatly safeguard both life and property, and prevents many wrecks and killing of many people."

125

The report of Mitchell, Chief Engineer, to the Governor of Georgia shows the urgent necessity in the year 1850 for a telegraph line along the Western & Atlantic Railroad, and the construction of half of that line at the time the report was made at very little cost. This report further states "we expect the line to be in working order as far as Chattanooga in a month or two more, when we expect to be able to infuse additional efficiency in the management and render the anxiety felt for the tardy trains less painful."

126

The defendant proved by Stephens that its present line of telegraph was situate and in operation where it now is from 1857 to date, and by Terrell from 1859 to date.

The court on plaintiffs motion refused to permit defendant to introduce in evidence a certified copy of the record of a suit of Enoch R. Mills against the Augusta, Atlanta & Nashville Magnetic Telegraph Company filed in Fulton Superior Court in the year 1853 with the return of service upon the defendant in that year, and pleas filed by the defendant, verdict, judgment and execution against



*Some Material Testimony Admitted and Excluded* 127

---

the defendant rendered in the year 1858; and also refused to permit defendant to introduce in evidence the record of a suit by Alfred M. Coffin against the Augusta, Atlanta & Nashville Magnetic Telegraph Company filed in Fulton Superior Court in the year 1860 with a return of service on the defendant, and the entrance of an appearance in that cause by the defendant, and its consent to the transfer of the case to an appeal. The defendant stated that it desired to introduce in evidence the record of said two suits to prove the actual existence of the Augusta, Atlanta & Nashville Magnetic Telegraph Company from which the acceptance by it of the charter granted it by the State of Georgia by its statute of January 27, 1852, would be presumed. 128

Defendant introduced in evidence the Garst & Bean contract and the report of Engineer Mitchell, and the act of January 27, 1852, incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company.

The court refused to permit the defendant to introduce in evidence deeds and proof of the transition of the title of Garst & Bean and of the Augusta, Atlanta & Nashville Magnetic Telegraph Company into itself. 129

The court refused to permit the defendant to introduce in evidence its contract with the State of August 18, 1870, by which the State granted an easement in perpetuity to the Western Union Telegraph Company. The court also refused to permit the defendant to introduce in evidence the resolutions of the General Assembly of the State of Georgia of October 22, 1887, of December 19, 1893 and of December 18, 1894 and Stephens testimony (motion for new trial par. 67) and refused to per-

130 *Some Material Testimony Admitted and Excluded*

---

mit defendant to introduce in evidence the act of 1847 authorizing the construction of telegraph lines on highways.

131 The trial judge declined to give in charge to the jury any of the requests presented by defendant, including a charge that the burden of proof is on the plaintiffs; that upon the proof of outstanding title from the State to the Augusta, Atlanta & Nashville Magnetic Telegraph Company the plaintiffs cannot recover even though defendant does not connect itself with that title; that from long continued possession by defendant the law presumes a grant from its predecessors in title; that this presumption applies against the State of Georgia in this case even if, as plaintiff in this cause, or as the owner of the Western & Atlantic Railroad, it is a sovereign with only sovereign attributes.

## THE VERDICT.

133

The judge submitted to the jury eight special issues, the answers to which constitute the verdict. The jury found:

1. (By direction of the Court) the State of Georgia is the sole and exclusive owner of the right of way of the Western & Atlantic Railroad from Atlanta, Georgia, to Chattanooga, Tennessee, in its sovereign and governmental capacity.

2. (By direction of the Court) the Nashville, Chattanooga & St. Louis Railway is the lessee from the State of Georgia of the Western & Atlantic Railroad and its right of way, operating said railroad under the corporate name of the Western & Atlantic Railroad under lease to the Nashville, Chattanooga & St. Louis Railway dated May 11, 1917, under the Act of the General Assembly of Georgia approved November 30, 1915, and the amendments thereto.

134

3. The Western Union Telegraph Company is maintaining and operating poles and wires over, upon and along the right of way of the Western & Atlantic Railroad between Atlanta, Georgia, and Chattanooga, Tennessee.

4. The maintenance, operation and occupation by the Western Union Telegraph Company is substantially as described in paragraph 6 of the original answer of the Western Union Telegraph Company with certain specified exceptions.

135

5. The use and occupation is without authority from the State of Georgia, is contrary to the will and consent of the Nashville, Chattanooga & St. Louis Railway as lessee of the Western & Atlantic Railroad, and constitutes an unlawful encroachment on said right of way and an adverse use thereof.

6. (By direction of the Court) this suit is in-

stituted and prosecuted in the name of the State of Georgia and in its behalf under the Act of the General Assembly of the State of Georgia of November 30, 1915, and amendments thereof, and under the provisions of said contract of lease of May 11, 1917, under by virtue of the authority and direction of the Western & Atlantic Railroad Commission, and is joined in by the Nashville, Chattanooga & St. Louis Railway as such lessee.

137 7. The Western Union Telegraph Company is occupying the right of way of the Western & Atlantic Railroad without the authority of the State of Georgia and without the consent of its lessees.

8. Twelve months from date is a reasonable time to allow the defendant for its removal of its telegraph lines from the right of way of the Western & Atlantic Railroad.

### THE DECREE.

138 Thereupon a decree was rendered which referred to the verdict and made the same the decree of the court as if set forth in the decree. The decree further found that the Western Union Telegraph Company is without lawful right or authority to use or occupy any portion of the right of way of the Western & Atlantic Railroad; commanded a cessation of such use and occupancy; and directed the removal of the telegraph lines from said right of way within twelve months from June 5, 1922. The defendant, its officers, servants and agents, were by the decree perpetually enjoined from such use and occupancy from and after twelve months from June 5, 1922, by which time defendant was commanded to remove its telegraph lines from said right of way.

A motion for new trial was made and filed. An order thereon was rendered superseding the judgment. The motion was amended, and a brief of evidence and the charge of court were filed. The motion for new trial was overruled. Exceptions pendente lite were duly signed and filed to the final decree. A direct bill of exceptions to the Supreme Court of Georgia was sued out and signed. Error was assigned upon defendant's bill of exceptions pendente lite to the judgment of the court rendered on plaintiffs' motion to strike from defendant's original answer and pleas; upon defendant's bill of exceptions pendente lite rendered upon plaintiffs' motion to strike portions of defendant's amended answer and pleas; upon defendant's bill of exceptions pendente lite to the final decree of the trial court; and upon the order and judgment of the trial court overruling defendant's motion for a new trial. 140

### **FINAL JUDGMENT OF THE SUPREME COURT.**

On September 13, 1923, the Supreme Court of Georgia rendered the following final decision in the cause, to wit: 141

"Western Union Telegraph Co. v. State of Georgia et al.

"This case came before this court upon a writ of error from the Superior Court of Fulton County; and, after argument had, the case being for consideration by a full bench of six Justices, after consideration, (and though there is no disagreement as to many points presented for decision) three Jus-

142 *Conflicting Opinions of Justices of Supreme Court*

---

tices, to wit, Russell, C. J., Hill and Gilbert, JJ., are of the opinion that the judgment of the court below should be affirmed, and three Justices, to wit, Beck, P. J., Atkinson, J., and Custer, J., (who was designated by the Governor, and presided in place of Hines, J., disqualified), are of the opinion that the judgment of the court below should be reversed, and therefore the judgment of the lower court stands affirmed by operation of law."

143 **CONFLICTING OPINIONS OF JUSTICES  
OF SUPREME COURT OF GEORGIA.**

**Opinion by Chief Justice Russell.**

Chief Justice Russell in the decision rendered by him said,

144 "I freely concede that there were quite a number of errors in the conduct of the trial but none of them affected or could have affected the result reached in the case, and in my opinion, no other result could have been attained either as a matter of reason or of law."

"In this action the plaintiff must recover upon the strength of its title and not upon the weakness of the title of the Western Union Telegraph Company;" but

"Of the fact that the State of Georgia is the owner of the Western & Atlantic Railroad, the lower court could properly take cognizance, and *no proof was required to establish the State's ownership.*"

*Conflicting Opinions of Justices of Supreme Court  
of Georgia*

145

"Therefore, upon the *reading* of the petition the plaintiff,—would have cast the burden upon the defendant to establish the the validity of its claim of right or title;" and

"Therefore the question is still further narrowed to the single question as to whether the defendant in this case carried the burden of establishing its right to occupy any portion of the right of way of the Western & Atlantic Railroad."

146

"There was a failure on the part of the defendant in the court below,—to establish—that it was the owner of any interest whatsoever in the right of way of the Western & Atlantic Railroad, either by grant, prescription or otherwise, and—for that reason any error committed by the court during the trial was *powerless* to prevent the verdict rendered by the jury and the judgment entered thereon."

"There can be no question that the State is the owner of the right of way of the Western & Atlantic Railroad and has been its owner since the first beginning of the undertaking."

147

"It is immaterial whether the ownership is in fee or only an easement."

"Even if—the State only acquired an easement for its right of way it must be held that no right, interest, or enjoyment of even what the plaintiff in error admits is owned by the State has ever been lawfully granted by the State to anyone."



149

The reference by Chief Justice Russell to the cases cited as opposing the view entertained by him necessarily includes the four cases named plead in paragraph 1 of the original answer.

150

1. The act incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company by sec-

*Conflicting Opinions of Justices of Supreme Court of Georgia* 151

tion 6 thereof neither ratified the contract between the State of Georgia and Garst & Bean of 1850, nor by section 9 did it grant to that corporation easements.

Section 6 of the act is expressly referred to. Section 9 appears to be referred to by the following language, "in the act of 1852—there is included—a provision that the State of Georgia is granting a definite right of way or easements which shall incumber its right of way for all time."

152

Judge Russell held that the title of the act was neither broad enough to cover a provision therein ratifying the Garst & Bean contract, (section 6), or the grant of right of way (section 9), and that these sections are unconstitutional and void because of the following provision of the Georgia Constitution then in force, to wit: "Nor shall any law or ordinance be passed containing any matter different from what is expressed in the title thereof."

In holding section 6 and section 9 of the act void, Judge Russell disposed of the first proposition controlling, in his opinion, the case. 153

2. The second proposition controlling the case in the opinion of Justice Russell is that no prescriptive title ran against the State except from the time of the adoption of the Georgia Act of March 6, 1856. Under that Act the statute of limitations ran against the State of Georgia. The Georgia Code of 1861 which did not go into effect until January 1, 1863, supplanted the statute of limita-

154 *Conflicting Opinions of Justices of Supreme Court  
of Georgia*

tions by the statute of title by adverse possession—the same creature under another name.

155 The provisions of this Code relating to title by adverse possession do not specifically apply to the State. The third paragraph of Judge Russell's decision is a finding that between 1857 and 1861 the necessary length of time had not run to bar the State and that after the Code of 1861 became operative title by adverse possession can not be acquired against the State. This decision is broad enough to apply both to land in Tennessee and in Georgia, and is an adjudication that plead statutes of limitation and of prescriptive title of the State of Tennessee are inapplicable to, and not operative against, the State of Georgia as the owner or claimant of lands in the State of Tennessee.

**Opinion by Justice Custer.**

156 The decision of Justice Custer and of Presiding Justice Beck and of Associate Justice Atkinson holds that if the contract between Mitchell, Chief Engineer of the Western & Atlantic Railroad and Garst & Bean, of October 11, 1850, "was a binding contract upon the State, then the right to use the right of way of the Western & Atlantic Railroad was conveyed and granted to the Telegraph Company.—The controlling question in passing upon the court's ruling upon the pleading in this case is whether, that contract was executed in such a way as to make it binding upon the State and the other parties thereto."

*Conflicting Opinions of Justices of Supreme Court of Georgia* 157

---

After stating this contract the court said that if Mitchell had authority to make the contract an easement was thereby granted to the Telegraph Company for which Garst & Bean were acting. If Mitchell was without authority, but it "was afterwards approved and duly ratified by the General Assembly of the State—then the contract became binding upon the State."

The decision refers specifically to section 6 of the act, holds that that section does not violate the Georgia Constitution and is valid. The decision said "This section of the Act is an approval and complete ratification of the contract entered into between Mitchell and Garst & Bean, and—had the effect of granting to the Telegraph Company the franchise which permitted it to maintain and operate a telegraph line over the right of way of the Western & Atlantic Railroad." 153

This decision cited and followed the unanimous decision of a full bench of the Supreme Court of Georgia in *Goldsmith vs. Rome Railroad Company*, 62 Ga. 473, which cited and followed a number of earlier decisions of the Supreme Court of Georgia by full bench including particularly *Davis vs. Bank of Fulton*, 31 Ga. 69. The decision of Justice Custer, after citing the decision of *Goldsmith vs. Rome Railroad Company* in 62 Georgia says: "It covers and adjudicates in principle the question which we are called upon here to decide." 159

160

*Petition for Rehearing*  
*Final Judgment of the Supreme Court of Georgia*  
*Denying Petition for Rehearing*

---

**PETITION FOR REHEARING.**

The Western Union Telegraph Company filed its petition in the Supreme Court of Georgia for a rehearing upon grounds therein set forth.

161

Before final decision the Western Union Telegraph Company filed its claim to the effect that the divided opinion of the Supreme Court of Georgia would result in changing the rule of construction of that court, which would be repugnant to the Constitution of the United States; section 6 and section 9 of the Act of January 27, 1852, being by the present judgment held unconstitutional, whereas under the unanimous unreversed decisions of the Supreme Court of Georgia previously existing those sections are, and would have been held, constitutional. The change in the rule of construction impairs the obligation of a contract contrary to the provisions of the Constitution of the United States.

162

**FINAL JUDGMENT OF THE SUPREME  
 COURT OF GEORGIA DENYING PETI-  
 TION FOR REHEARING.**

On September 29, 1923, the Supreme Court of Georgia refused to grant a rehearing.

**BRIEF.**

163

**I.****Impairment of Contracts.**

Petitioner claims that Georgia, by her act of November 30, 1915, and its amendments, by her lease of the W. & A. R. R. under that act, and by the action of her W. & A. R. R. Commission, has impaired contracts made by her with predecessors in title of the Western Union Telegraph Company, to wit:

- (1) A contract with Garst & Bean (Exhibit 2); 164
- (2) A contract with A. A. & N. M. T. Co. A. D. 1852 (Exhibit 3);

And has impaired

- (3) A contract made by Georgia directly with the Western Union Telegraph Company August 18, 1870 (Exhibit 4).

The final decree in this cause adjudges that the Georgia Act of November 30, 1915, authorized the lease to the N. C. & St. L. Ry. of easements covered by the three contracts last mentioned; that Georgia by her lease of 1917 did lease those easements to the N. C. & St. L. Ry.; that the lease act of November 30, 1915, and its amendments, authorized the W. & A. R. R. Commission to question and attack the title of the Western Union Telegraph Company to the easements occupied by it under those contracts; and authorized that Commission to remove the lines of telegraph of the Western Union Telegraph Company from those easements and to cause a discontinuance thereof.

165

The final decree sustains the finding of the Com-

mission that petitioner's telegraph lines are an unlawful encroachment upon the right of way of the W. & A. R. R.; that petitioner has no right to maintain and operate those lines where now located; sustains the finding and determination of the Commission that those lines must be removed. The decree requires the removal of petitioner's telegraph lines so that the easements necessary therefor may be given to, and delivered into the possession of, the N. C. & St. L. Ry. under the Georgia Act of November 30, 1915, and its amendments, and under said lease, and under the action of Georgia through her Railroad Commission.

167

Two questions arise for determination by this Court.

(1) Was a lawful contract made by the State of Georgia with Garst & Bean or with the A. A. & N. M. T. Co., the predecessors in title of petitioner; and was a lawful contract made by Georgia with petitioner under the contract of August 18, 1870?

(2) Has the State of Georgia passed any law impairing the obligations of those contracts, or of either of them?

168

The Justices of the Supreme Court of Georgia are evenly divided as to whether a lawful contract was made by the State of Georgia with Garst & Bean or with the A. A. & N. M. T. Co.

The validity of the contract of August 18, 1870, between Georgia and petitioner is not discussed by any of the Justices of the Supreme Court of Georgia.

The Garst & Bean contract is valid for the reason stated in ground number 3 of the petition for rehearing in the Supreme Court of Georgia.

The validity of the contract-grant by the State of Georgia to the A. A. & N. M. T. Co. of the ease-



ments now occupied by petitioner depends, in the opinion of the Supreme Court of Georgia, on the construction and effect of the provision of the then existing Georgia Constitution, to wit, "*nor shall any law or ordinance pass containing any matter different from what is expressed in the title thereof.*"

Section 6 of the act incorporating the A. A. & N. M. T. Co. ratifies the Garst & Bean contract. Three Justices held that the ratifying provision of that section is matter different from that expressed in the title of the act and is, therefore, unconstitutional. Three Justices are of exactly the opposite opinion.

170

The Garst and Bean contract and section 9 of the act of 1852 each granted an assignable, irrevocable and perpetual easement.

*Ga. vs. Trustees of Cinn. Sou. Ry.* 248  
U. S. 26.

*Sheffield vs. Collier*, 3 Ga. 82, 86.  
*Georgia Code, Paragraph 3645.*

While the Justices of the Supreme Court of Georgia only deal with section 9 inferentially, it is apparent from their decisions that three of the Justices were of the opinion that section 9 of the act of 1852 was opposed to the above mentioned provision of the Georgia Constitution, while the remaining three Justices thought section 9 valid under that constitution. In grounds 2 and 3 of the petition for rehearing in the Supreme Court of Georgia, as well as in the decision rendered by Justice Custer of the Georgia Supreme Court, it is claimed that under former unanimous and unreversed decisions of the Supreme Court of Georgia

171

section 6 and section 9 of the Act of 1852 are constitutional and constitute lawful grants to the A. A. & N. M. T. Co, the predecessor in title of petitioner.

The Georgia decisions there cited and relied upon are *Goldsmith vs. Rome R. R.*, 62 Ga. 473; *Davis vs. Bank of Fulton*, 31 Ga. 69; *Goldsmith vs. A. & S. R. R. Co.*, 62 Ga. 468; *Hope vs. Mayor*, 72 Ga. 246; and *Bonner vs. Milledgeville Ry. Co.*, 123 Ga. 115.

173 The Georgia law is that the foregoing decisions stand until set aside in the manner provided by law, and until then have the force and effect of a statute.

*Georgia Code par.* 6207.

*Heard vs. Russell*, 59 Ga. 25, 54.

*Lucas vs. Lucas*, 30 Ga. 191.

*Fidelity Co. vs. Nesbit*, 119 Ga. 316, 325.

174 While due deference is given by this Court to the opinions and decisions of State courts, this Court has always held that it must for itself decide, where impairment of a contract is claimed, whether in fact a contract did in the first instance exist. And this Court has never hesitated or refused to reverse a decision or judgment of a State court, holding that no contract existed when this Court reached the conclusion that there was a valid existing contract.

*Columbia Ry. G. & E. Co. vs. State of S. C.*

—U. S.— 43 S. C. Rep. 306.

*Ga. Ry. & P. Co. vs. Town of Decatur*,

—U. S.—43 S. C. 613.

*Detroit United Ry. vs. Michigan*, 242

U. S. 238, 247-251.

---

*Louisiana R. & N. Co. vs. New Orleans*,  
235 U. S. 164, 170-171.

*St. Paul Gas Light Co. vs. St. Paul*, 181  
U. S. 142, 147.

*Water Power vs. Street Ry. Co.*, 172  
U. S. 475, 487.

Where the act in question was held by the State Court to be void because opposed to the *State Constitution*, this Court upon reaching the opposite opinion has held the act valid under the *State Constitution* and has reversed the State Court.

176

*Houston & T. C. R. R. Co. vs. Texas*, 177  
U. S. 66, 77.

See also

*Ohio Life Ins. & T. Co. vs. Debolt*, 16 How.  
416, 431, 432.

*Gelpcke vs. City of Dubuque*, 1 Wall. 175,  
205, 206.

The Georgia decisions above cited are in full accord with the decisions of this Court. *Montclair vs. Ramsdell*, 107 U. S. 147, 155, is approvingly quoted and followed in *Hope vs. Mayor*, 72 Ga. 246, 250. Of like import are *Detroit vs. Detroit Railway*, 184 U. S. 368, 391-392; *Blair vs. Chicago*, 201 U. S. 400, 451. These decisions fully support and sustain the decision of Justice Custer and the two Justices concurring with him interpreting the Georgia Constitution and the Georgia Act of 1852, and in deciding that section 6 thereof ratifying the contract with Garst & Bean and section 9 of that act independently granting easements are valid.

177

The interpretation upholding the validity of sections 6 and 9 of the act of 1852 is also supported

by the practice of the various departments of Georgia by acquiescence in the construction of telegraph lines under the Garst & Bean contract and the Act of 1852, as well as under the contract of August 18, 1870, and by acquiescence in the use of easements necessary therefor, and the operation of those lines with constantly accruing benefit to the State of Georgia. Such collateral interpretation is entitled to great weight even when a statute is assailed on the ground of unconstitutionality.

*Howell vs. State*, 71 Ga. 224, 229.

*Stuart vs. Laird*, 1 Cranch 299, h.n. 3, page 309.

*U. S. vs. Philbrick*, 120 U. S. 52, 59.

*U. S. vs. Alabama G. S. R. R. Co.*, 142 U. S. 615, 621.

*U. S. vs. Johnson*, 124 U. S. 253.

*Roberts vs. Downing*, 127 U. S. 607, 613.

*U. S. vs. Hermonos*, 209 U. S. 337, 339.

*Johnson vs. Towsley*, 13 Wall. 72.

In *U. S. vs Des Moines Navigation Co.*, 142 U. S. 510, in which a grant by the United States was attacked, the court said in the last head note

“The knowledge and good faith of the legislature are not open to question, but the presumption is conclusive that it acted with full knowledge and in good faith.”

The contract of August 18, 1870, with petitioner is not discussed in the opinions of the Justices of the Supreme Court of Georgia. The effect of the judgment of that court nevertheless is to uphold the decision of the trial court under which that

contract was impaired by the Georgia Act of 1915 and its amendments, by the Georgia lease of 1917, and by the action of the W. & A. R. R. Commission.

That contract is the basis of ground 4 of the petition for rehearing in the Supreme Court of Georgia. That contract was authorized by the Georgia act of January 15, 1852, there quoted.

There can be no doubt, and the Supreme Court of Georgia evidently concedes, that the foregoing contracts and each of them, if valid, have been impaired by Georgia as claimed by Western Union Telegraph Company.

182

The impairment of the Georgia contracts with Garst & Bean, with the A. A. & N. M. T. Co., and with petitioner, were specifically plead in the answer of the Western Union Telegraph Company.

The force and effect claimed by plaintiffs for the Georgia Act of November 30, 1915, and its amendments, for the Georgia lease of 1917, and for the action of the W. & A. R. R. Commission, was stated in the petition and in the answer; and the answer alleged that, if the force and effect claimed by the plaintiffs should be given, the foregoing contracts, and each of them, would be impaired.

This Court has held that, if an act of the State Legislature is by judicial decree given a construction whereby a contract will be impaired, this Court should take jurisdiction of the case.

183

*Bridge Proprietors vs. Hoboken Co.* 1  
Wall. 116, 144-145.

In *Williams vs. Bruffy*, 96 U. S. 176, this Court said on page 184 "the constitutional provision prohibiting a State from *passing* a law equally prohibits a State from *enforcing* as a law an enactment

of that character, from whatever source originating," referring to enforcement by judicial decree.

Under the decisions of this Court, the Georgia Act of November 30, 1915, the action of Georgia in making its lease of 1917 to the N. C. & St. L. Ry., and the action of Georgia through its W. & A. R. R. Commission, each come within the scope of, and are within the inhibition of Art 1, Section 10, Par. 1 of the Constitution of the United States prohibiting the State from passing a law impairing the obligation of a contract.

185

*Arkadelphia Co. vs. St. Louis S. W. Ry. Co.*, 249 U. S. 134, 141.

*Reinman vs. Little Rock*, 237 U. S. 171, 176.

*A. C. L. R. R. Co. vs. Goldsboro*, 232 U. S. 548, 555.

*Williams vs. Bruffy*, 96 U. S. 176, 183.

The silence of the Supreme Court of Georgia upon constitutional questions raised do not affect those questions or the right of appeal to this Court.

186

*Corn Products Refg. Co. vs. Eddy*, 249 U. S. 427, 432.

*Dahnke-Walker Co. vs. Bondurandt* 257 U. S. 282, 289.

## II.

### Changed Rule of Construction.

Reason II for the grant of the writ is upon the ground that the final decision in this cause has changed the rule of construction existing at the

time the plead contracts were made under which those contracts were valid.

That ground for review and reversal by this Court is amply sustained by decisions of this Court holding that, where a contract was not violative of a State Constitution then existing and as then construed by the State Supreme Court, a subsequent change of decision by the State Supreme Court under which that contract would be held, or was held, violative of the State Constitution, would be a ground for review and reversal by this Court, because thereby a contract lawful when made would be impaired. Particularly was this held to be true where a construction, as in the case at bar, had been acted upon for a long period of years and contracts were made with the State upon the basis of the validity of that contract, from which the State has constantly received benefit. 188

*Ohio Life Ins. & T. Co. vs. Debolt*, 16 How. 416, 431-432.

*Gelpcke vs. City Dubuque*, 1 Wall. 175, 205, 206.

Of similar import are 189

*Havemeyer vs. Iowa Co.* 3 Wall, 294, 303.

*Muhlker vs. N. Y. & H. R. R. Co.* 197 U. S. 544.

### III.

#### Due Process of Law Denied.

Reason III for the grant of the writ is the claim that Georgia has deprived petitioner of property



without due process of law, and has denied it the equal protection of the laws.

The action of the W. & A. R. R. Commission is legislative not judicial. The act creating the Commission did not vest it with any judicial functions or processes.

191 The finding or determination of the Commission is tantamount to the finding or declaration by the legislature, or by a legislative committee. If upon any theory it can be said that the finding of this Commission was in any respect judicial, then its findings are a nullity because no provision is made for notice, or for an opportunity to be heard.

*S. F. & W. Ry. Co. vs. Mayor*, 196 Ga. 680, 683.

*Mott vs. State Board*, 148 Ga. 55, 59-60.

*Garfield vs. Goldsby*, 211 U. S. 249, 262.

*Londoner vs. Denver* 210 U. S. 373, 386.

192 The final decision of the Supreme Court of Georgia, as stated in Reason III (c), (d), (f) and (g), denied to the defendant the rules of practice and procedure constituting an essential part of due process of law provided under the decisions and under the laws of Georgia for litigants in her courts, invoked in this case by Georgia and its lessee.

Among the rules of law applicable are the following:

The burden is on the plaintiff to prove its asserted claims and title.

Georgia Code Par. 5746.

A plaintiff must recover on the strength of his own title. If he fails to prove title in himself he cannot recover.

---

*Jackson vs. Scroggin*, 42 Ga. 183.

*Roberts vs. Tift*, 136 Ga. 901, h.n. 4.

Upon proof of outstanding title in some one other than the plaintiff, plaintiff cannot recover even though defendant fails to connect himself with that outstanding title.

*Roberts vs. Tift*, 136 Ga. 901, h.n. 4.

*Waters vs. Durrence*, 119 Ga. 934 h.n. 4.

*Jenkins vs. Southern Ry. Co.* 109 Ga. 35  
h.n. 3 and page 41, par. 3.

194

*Willis vs. Metters*, 64 Ga. 721 h.n. 2.

*Coleman vs. Rice*, 105 Ga. 163, 164.

Defendant was denied the presumptions prevailing in its favor under the ordinary rules of law, and which constitute a part of due process of law.

Whether the State of Georgia does or does not operate its Railroad in a sovereign capacity, and whether in this suit it acts in the capacity of a sovereign or not, and even though the maxim *nul-lum tempus occurit regi* may be applicable, nevertheless presumptions do arise against the State of Georgia; and the presumption against Georgia of a grant upon proof of long adverse use and possession arises; and the defendant is entitled to that presumption as a part of due process of law in the trial of this cause.

195

*U. S. vs. Chaves*, 159 ~~U.S.~~ 452, 464.

*U. S. vs. Devereaux*, 90 Fed. 182, 187-188

(4 C.C.A. citing the case last mentioned  
and *Fletcher vs Fuller*, 120 U. S. 534.

*U. S. vs. Burns*, 160 Fed. 627, 632.

That this presumption is an essential part of due process of law, is clear from 159 U. S. 464 and 90 Fed. 187, showing the existence of this rule of law under the Common Law and under the Roman Law.

*Twining vs. New Jersey*, 211 U. S. 78, 100-101.

*C. Q. & B. R. R. Co. vs. Chicago*, 166 U. S. 226, bot. pg. 234, page 241 near top.

- 197 In *Fletcher vs. Fuller*, 120 U. S. 534, it was held, though not as against a sovereign State, that a grant under circumstances similar to those in this case would be presumed to exist.

The universal rule is that when a government or a sovereign state enters a court invoking its processes it subjects itself to the rules of law and of trial; the rule of burden of proof; and the presumptions applicable to an ordinary suitor.

*U. S. vs. Stinson*, 197 U. S. 202, 205.

*U. S. vs. Diamond Coal Co.*, 254 Fed. 266, 268 (8 C.C.A.)

- 198 *U. S. vs. Midway Oil Co.*, 232 Fed. 619, 631.

*U. S. vs. Chandler*, 152 Fed. 25, 41 (6 C.C.A. Lurton, J.)

*Iowa vs. Carr*, 191 Fed. 257, 266 (8 C.C.A.)

*U. S. vs. Debell*, 227 Fed. 775, 779 (8 C.C.A.)

*In re Morgan's Estate*, 159 N. Y. Supp. 105, 108.

*Peoples vs. Kings Co. Co.*, 191 Pac. 1004 (h.n.8) 1005, 1007.

---

*Commonwealth vs. Helm*, 173 S. W. 389, 392.

*Morris vs. State*, 87 Tenn. 725, 730.

*Shelby County vs. Rickford* 102 Tenn. 402.

The opinion of Chief Justice Russell and of the the two Justices concurring with him, sustain the verdict, and the judgment thereon, in the trial court, over defendant's objection that the plaintiffs had proved no title, in the following language:

"Of the fact that the State of Georgia is the owner of the Western & Atlantic Railroad, the lower court could properly take cognizance, and *no proof was required to establish the State's ownership.*" 200

"Therefore, upon the *reading* of the petition the plaintiff,—would have cast the burden upon the defendant to establish the validity of its claim of right or title;" and

"Therefore the question is still further narrowed to the single question as to whether the defendant in this case carried the burden of establishing its right to occupy any portion of the right of way of the Western & Atlantic Railroad." 201

If the mere reading of the plaintiff's petition sufficed to prove plaintiffs title (the State of Georgia and an ordinary railroad corporation, its lessee) and relieved them of the necessity of introducing any evidence to prove title alleged in the petition, it results either (1) that this was because of the Georgia Act of November 30, 1915, and its amendments, the lease, and the action of the W. & A. R. R. Commission, in which event due process

202

of law was lacking for the reasons elsewhere herein stated; or (2) that due process was lacking in the trial of the case in that an arbitrary presumption was allowed in favor of the plaintiffs and against the defendant, and there was imposed on defendant the burden of disproving plaintiff's title, or proving its own title, without the introduction of a particle of evidence by plaintiffs.

*Mobile J. & K. C. R. R. Co. vs. Turnip Seed*, 219 U. S. 35, 43.

203

*McFarland vs. American Sugar Co.*, 241 U. S. 79, 86.

In striking defendant's plea of laches, the action of the State through its legislative enactment, through its lease, and through its Commission, and the final decree interpreting and enforcing the same, has deprived petitioner of vested rights acquired under the Georgia Act of 1856, which has been of force from that day to the present time. This is opposed to the Constitution of the United States.

*Campbell vs. Holt*, 115 U. S. 620, 623, bottom of page.

204

*Pritchard vs. Norton*, 106 U. S. 124, 132.  
*French Republic vs. Saratoga*, 191 U. S. 427, 438.

See also

*Indiana vs. Milk*, 11 Fed. 389, 397.

*Pengra vs. Munez*, 29 Fed. 830, 836.

*Cohn vs. Barnes*, 5 Fed. 326 334.

*U. S. vs. M'Laughlin*, 30 Fed. 147, bot. pg. 161, 162.

*New York City vs. Pine*, 185 U. S. 93, and Georgia cases cited 101, 103.

Striking the defense of the Tennessee statutes of limitation, and giving no force and effect to Tennessee decisions plead to the effect that in Tennessee the State of Georgia was not a sovereign in respect to her railroad (Reason III (d) ), denied petitioner the protection of Art. 4, Sec. 1, Par. 1 of the Constitution of the United States requiring full faith and credit to be given the laws of Tennessee, and resulted in the taking of petitioner's property without due process of law.

For like reasons the other grounds upon which reason V is based are well founded.

206

In support of reason III (d), we call attention to grounds 5, 7 and 8 of the petition for rehearing in the Supreme Court. In support of reason III (e) we call attention to ground 6 of that petition for rehearing. In support of reason III (f) we call attention to ground 9 of that petition for rehearing. We avoid repetition of what is stated in those grounds of the rehearing, and do not here cite the decisions cited therein, which are pertinent.

In adjudging that the State of Georgia in the ownership and operation of its railroad both in Georgia and in Tennessee, acts in a sovereign capacity only, the decree and the decision of the Supreme Court fails to accord the Western Union Telegraph Company the benefit of the section of the Constitution of the United States requiring full faith and credit to be given to the laws and decisions of Tennessee, and conflicts with, and departs from, the following decisions plead in paragraph 1 of its answer to wit:

207

*W. & A. R. R. vs. Carlton*, 28 Ga. 180;  
*Schofield vs. Georgia*, 54 Ga. 635;

---

*W. & A. R. R. Co. vs. Taylor*, 6 Heisk. 408 (Tenn);

*Hutchinson vs. W. & A. R. R. Co.*, 6 Heisk. 634 (Tenn);

conflicts with the following cases cited in ground 6 of petition for rehearing in the Supreme Court of Georgia and cited in our original brief in that court, to wit:

*Morris vs. State*, 87 Tenn. 726;

*Shelby Co. vs. Rickford*, 102 Tenn. 402;

209 *Tappan vs W. & A. R. R. Co.*, 3 Lea. 106 Tenn.;

and conflicts with *Morrison vs. Cook*, 146 Ga. 570, 577, cited in amendment to said petition for rehearing.

Said decree and the decision of the Supreme Court of Georgia on this point are in conflict with the decision of this and other courts to wit:

*U. S. vs. Planters Bank*, 9 Wheat. 904, 907-8.

*South Carolina vs. U. S.*, 199 U. S. 437, h.n. 8 and pgs. 461-3.

210 *Villas vs. City of Manila*, 220 U. S. 345, 356.

*Los Angeles vs. Los Angeles Gas Co.*, 251 U. S. 32.

*U. S. vs. Strang*, 254 U. S. 491.

*Sallos vs. U. S.*, 234 Fed. 842 (2 C.C.A.)

*Panama R. R. vs. Curran*, 256 Fed. 768, 772 (5 C.C.A.)

*Davis vs. Gray*, 16 Wall. 203, 232.

*State Bank vs. Knop*, 16 How. 369, 382.

*Hall vs. Wisconsin*, 103 U. S. 5, 11.

*French Republic vs. Saratoga*, 191 U. S. 427.



---

*Cook vs. U. S.*, 91 U. S. 389, 398.

The points made in Reason III (c), (d), (e), (f) and (g) are not grounds for review by this Court where due process of law has been applied in the State Court, even though this Court should differ with the conclusion of the State Court. That is not the case made under Reason III (c), (d), (e), (f) and (g). The case there made is that due process of law has been denied the petitioner in the trial of the cause, because the final decision in the cause, supporting the trial court, has given the act of November 30, 1915, and its amendments, and the action of Georgia in making her lease of 1917, and her action through her Commission, such force and effect that thereby due process of law in the respects mentioned has been denied petitioner. The effect of the decision also is that the due processes of law applicable to an individual in Georgia Courts are not applicable in this cause against the State of Georgia, or its lessee, and do not operate in favor of the Western Union Telegraph Company. If that is true, no machinery is provided by Georgia law for the guidance or control of its judiciary when the sovereign State is before it as a party litigant.

212

213

If the decree enforces action by the State detrimental to the Western Union Telegraph Company, enforces a lease by Georgia to another of easements or properties of the Western Union Telegraph Company, or commands delivery thereof by the Western Union Telegraph Company to another, as the culmination of a trial devoid of due process of law in the respects claimed, the decree is void.

If the decree rendered commanding the removal of lines of telegraph of the Western Union Tele-

214

graph Company, and commanding the surrender by it of its easements, rights and properties to the present lessee, does so merely because of the State's action through her legislative statute, through her lease, or through her Commission, it is void, because that act, that lease, and that action of the Commission, has taken property without due process of law.

215

The Western Union Telegraph Company plead, and sought to prove, facts and muniments of title showing the transition of the title of Garst & Bean and of the Augusta, Atlanta & Nashville Magnetic Telegraph Company into itself. Practically all of this was stricken and excluded by the trial Judge as irrelevant upon the theory that there was in fact no valid grant to either Garst & Bean or to the Augusta, Atlanta & Nashville Magnetic Telegraph Company.

The decision of Justice Russell does not touch upon the sufficiency of the facts and muniments of title plead or offered in evidence to show the transition of these grants to the Western Union Telegraph Company. That is not questioned by Judge Russell's decision.

216

Judge Custer's decision on this point is

"The facts and circumstances pleaded should have been left for the consideration of the jury; and we are of the opinion that in view of those facts and circumstances pleaded, as well as the documents introduced which bore upon the question of title, the jury would have been authorized to find against the State; especially in view of the one monumental, towering, dominating fact, that this defendant and its predecessors in

title has for nearly three quarters of a century been in the peaceable enjoyment of the easement, the right to which is now denied it. If in any case a grant should be presumed, it should be presumed in favor of this defendant under the facts alleged and proved in this record."

Under those facts transition of title is presumed.

*Fletcher vs. Fuller*, 120 U. S. 534.

*Wilson vs. Snow*, 228 U. S. 217, 220.

*Johnson vs. Jarvis*, 223 Fed. 756, 757-8 (4 C.C.A.). 218

*Sweeney vs. Sweeney*, 119 Ga. 76 h. n. 1 (c).

*Terry vs. Rodahan*, 79 Ga. 278.

*McCleskey vs. Leadbetter*, 1 Ga. 551, 557.

*Smith vs. McIntire*, 83 Fed. 456, 467.

*Houston Co. vs. Drumwright*, 162 S. W. 1011, 1014.

*Daugherty vs. Welshans*, 81 Fed. 1001, -2.

*Brewer vs. Cochran*, 99 S. W. 1033, 1036.

*Anderson vs. Cole*, 36 S. W. 395, 396.

The facts plead and the evidence introduced and sought to be introduced, clearly show the passage into the Western Union Telegraph Company of title originating in grants from the State of Georgia.

219

Respectfully submitted,

FRANCIS RAYMOND STARK.

ARTHUR HEYMAN.

WILLIAM L. CLAY.

Attorneys for Western Union Telegraph Co  
Petitioner.

**EXHIBIT 1.**

**An Act to authorize the construction of the Magnetic Telegraph and providing for the protection of the same.—Approved Dec. 29, 1847. Pam. 218.**

Whereas, many of the citizens of the State of Georgia are interested in the construction of lines of the Magnetic Telegraph, and desire the protection of their property, and the privilege of using the public roads and highways for their posts and wires.

221

1. Sec. 1. Be it enacted, That any company or individual may erect posts and wires, and other fixtures for Telegraphic purposes, on or by the side of any public road or highway in this State: Provided, that such posts, wires or fixtures shall in no case be so set or placed as to obstruct, hinder, or in any way interfere with the common uses or business of said roads or highways.

**EXHIBIT 2.**

222

**Report of Chief Engineer W. & A. R. R. to Governor of Georgia.**

On the 10th October, 1850, Messrs. Garst & Bean proposed to organize a company of stockholders and to build for them a telegraph line from Atlanta to Nashville, which was subsequently made to embrace the Georgia Railroad and to extend to Augusta, expressing a desire, at the same time of procuring the aid and countenance of the Western & Atlantic Railroad of the State of Georgia. The Company is called the Augusta, Atlanta and Nash-

---

ville Telegraph Company. Mr. Garst retired and Mr. Bean prosecuted the enterprise alone. The following correspondence will explain the precise terms of the contract between the Road and the Telegraph Company.

Chief Engineer's Office, W. & A. R. R.  
 Atlanta, Oct. 11, 1850.

Gentlemen:

I have given much reflection to the subject of your note of yesterday, and I have had full and free conversation with His Excellency George W. Towns upon the subject, and we are fully satisfied, not only from the nature of the telegraph but from the experience of other roads, that there is no appendage more valuable in the efficient management of a railroad than a telegraph line, and we have come to the conclusion to submit to you this proposition: 224

1. To furnish and erect the posts from Atlanta to Chattanooga, which shall be 24 feet long with four inches in diameter at the little end, and be planted four feet in the ground.

2. To grant you the use of our right of way for the telegraph company, and to pass your officers and materials along the road free of charge. 225

3. For and in consideration of the foregoing, the Western & Atlantic R. R. is to receive the sum of five thousand dollars to be placed to its credit upon the books of the Telegraph Company, and instead of interest on that sum, it is to receive dividends as they may be declared from time to time, and to be represented in the meetings of the company to that amount by the Chief Engineer, or such other person as may be appointed to represent the same.

4. And in further consideration of the foregoing services and grant, all the telegraph offices between

*Exhibit 2*

226

Atlanta and Nashville erected by the Company shall be subject to the use of said road free of charge, and said company shall erect as many offices as the road may require in addition to the regular offices of the Company, but the latter shall be at the expense of the road.

Yours respectfully,

N. L. MITCHELL,  
Chief Engineer.

227      MR. DAVID W. GARST,  
            and  
            MR. JAMES M. BEAN,  
            Atlanta, Ga.

Atlanta, Oct. 11, 1850.

Sir: We hereby accept the proposition submitted in yours of this date.

Yours respectfully,  
D. W. GARST,  
J. M. BEAN.

W. L. Mitchell, Esq.,  
Chief Engineer & c.,  
Atlanta, Ga.

228

Whereupon I passed an order, that so soon as the telegraph company is sufficiently organized to warrant the undertaking, the Resident Engineer and Road Master make all the necessary arrangements for carrying out our part of the foregoing contract; but we did not commence planting the posts till last May, and from a desire to economize as much as possible and do the work with our repairing parties so as not to interrupt their regular duties, the work has progressed slowly, but all the posts have been delivered and half or more are

planted, and the wire stretched beyond Kingston. Telegraph offices have been established at Atlanta, Marietta, Cartersville and Kingston, and a branch line has been established from Kingston to Rome and an office placed there.

Our out-lay of money for this job has been but little beyond the cost of the posts, and they have been delivered at fifteen cents apiece. We expect the line to be in working order as far as Chattanooga in a month or two more, when we expect to be able to infuse additional efficiency in the management and render the anxiety felt for the tardy trains less painful. 230

### EXHIBIT 3.

#### **An Act to incorporate the Augusta, Atlanta and Nashville Magnetic Telegraph Company. Approved, January 27, 1852.**

1. Sec. I. Be it enacted by the Senate and House of Representatives of the State of Georgia in General Assembly met, and it is hereby enacted by the authority of the same, That James M. Bean, John H. Glover, and John P. King, and such persons as now are, or hereafter may be associated with them, including the subscribers in this State who may have acquired from Samuel F. B. Morse the right to construct and carry on the Electro-Magnetic Telegraph, by him invented and patented, through this State and other States, on the route leading from the City of Augusta, through Atlanta, to the city of Nashville, in the State of Tennessee, be and they are hereby made and declared a body politic and corporate in law, for the purpose of constructing, erecting and maintaining a line of the said Telegraph, on the route afore- 231



said, or any other route through and within this State, and of transmitting intelligence by means thereof, by the name and style of the Augusta, Atlanta, and Nashville Magnetic Telegraph Company.

3. Sec. III. That the said corporation shall have power and authority to build or purchase any connecting or side line in this State, having acquired the right to do so from the owners of Morse's Patent, and may enlarge its capital for that purpose.

233 6. Sec. VI. And be it further enacted, That the contract entered into on the eleventh day of October, 1850, by William L. Mitchell, Chief Engineer of the Western & Atlantic Railroad, and D. W. Garst and J. M. Bean, on the part of said Company be and the same is hereby ratified and affirmed, and that at every election, each share shall entitle its holder to one vote, and absent Stockholders may vote by agent or proxy, on producing written authority so to do. And in case of an equal number of votes on both sides, the election shall be decided by lot, and the Chief Engineer of said Railroad, or other officer having the chief control of said Road  
234 for the time being, shall by himself, or his proxy duly authorized, cast the vote to which the State is entitled under said contract.

8. Sec. VIII. That the said Corporation shall have power and authority to contract with any person or persons, or bodies corporate, for the purpose of connecting its lines of Telegraph with lines out of the State.

9. Sec. IX. That the Augusta, Atlanta, and Nashville Magnetic Telegraph Company, shall have power and authority to set up their fixtures along and across any high road or high roads; and any

---

railroad which now or may hereafter belong to this State, and any waters or water courses of this State, without the same being held or deemed a public nuisance, or subject to be abated by any private person; provided, The said fixtures be so placed as not to interfere with the common use of such roads, waters, or water courses, or with the convenience of any land owner, further than is unavoidable.—

#### **EXHIBIT 4.**

236

#### **Georgia statutes making laches operate against Georgia.**

Georgia Code of 1910.

"No. 4369. Limitations in equity. The limitations herein provided apply equally to all courts; and in addition to the above, courts of equity may interpose an equitable bar, whenever, from the lapse of time and laches of the complainant, it would be inequitable to allow a party to enforce their legal rights."

"No. 4371. Limitations to operate against the State. When, by the provisions of the foregoing sections, a private person would be barred of his rights, the State shall be barred of her rights under the same circumstances."

237

#### **EXHIBIT 5.**

#### **Resolution of W. & A. R. R. Commission directing institution of this suit.**

WHEREAS, the Nashville, Chattanooga & St. Louis Railway, as Lessee of the Western & Atlantic Railroad, under the lease beginning December 27, 1919, has represented to this Commission that the West-

ern Union Telegraph Company is adversely using and occupying the right of way of said railroad by telegraph lines, poles, wires and other appurtenances without authority therefor from the State of Georgia, and against the consent of the Nashville, Chattanooga & St. Louis Railway:

AND WHEREAS, the said Nashville, Chattanooga & St. Louis Railway has requested this Commission to take appropriate action for the removal of this encroachment and the discontinuance of this adverse use in pursuance of the Act creating this  
239 Commission as amended August 4, 1916, and of Paragraph 14 of the new lease contract:

AND WHEREAS, the Counsel for this Commission has reported that the adverse use and occupancy of said right of way by the Western Union Telegraph Company is without lawful authority from the State of Georgia; and that the institution of appropriate proceedings for the removal of said encroachment and the discontinuance of said use is within the purview of said Act of August 4th, 1916, and within the contemplation of Paragraph 14 of the new lease contract dated May 11th, 1917:

240 NOW, THEREFORE, BE IT RESOLVED, That William A. Wimbish, Counsel for this Commission, be, and he is hereby, authorized and directed to institute and prosecute, in the name and behalf of the State of Georgia, such suits and legal proceedings as may be appropriate for the removal of said encroachment and the discontinuance of said use: Provided, the Nashville, Chattanooga & St. Louis Railway, as such lessee, shall join in such suits and proceedings and defray the proper costs and expenses thereof without liability over against the State.



# I

## CASES CITED

	Pages
Andrews vs. Va. Ry. Co., 248 U. S. 272.....	3
A. B. & A. Ry. Co. vs. Coffee Co., 152 Ga. 432.....	11
A. B. & A. Ry. Co. vs. Penny, 119 Ga. 479.....	14
A. C. L. R. R. Co. vs. Tel. Co., 120 Ga. 268.....	11
Barnsdall vs. Waltemeyer, 142 Fed. 415.....	14
Bennicke vs. Ins. Co., 105 U. S. 355.....	15
Bierce vs. Hutchins, 205 U. S. 340.....	14
Bloomfield vs. Charter Oak, 121 U. S. 135.....	15
Bridge Proprietors vs. Hoboken, 1 Wall. 116.....	6
Brant vs. Va. Coal Co., 93 U. S. 326.....	15
Brunswick R. R. vs. Waycross, 91 Ga. 575.....	11
Bybee vs. R. R. Co., 139 U. S. 681.....	15
Cain vs. Busbee 30 Ga. 714.....	15
Calcasieu Co. vs. Harris, 43 A. & E. R. R. Cas. 570.....	11
Central Co. vs. Nolan, 135 Ga. 443.....	14
Central R. R. vs. Standard, 144 Ga. 92.....	11
Charleston R. R. Co. vs. Hughes, 105 Ga. 1.....	14
Chicago Ry. vs. Basham, 249 U. S. 448.....	3
Chicago Ry. vs. U. S., 217 U. S. 180.....	3
Citizens Bank vs. Opperman, 249 U. S. 448.....	3
Crary vs. Dye, 208 U. S. 521.....	15
East Alabama R. R. Co. vs. Doe, 114 U. S. 340.....	11
Essex vs. Tel. Co., 239 U. S. 320.....	3
Frith vs. Siler, 32 Ga. 665.....	15
Gaither vs. Gaither, 23 Ga. 521.....	15
Gibbs vs. Gas Co., 130 U. S. 396.....	3, 16
Gwinn vs. Smith 55 Ga. 145.....	14
Georgia Code, Par. 5737.....	16
5738.....	16
Harrell vs. Terrell 125 Ga. 379.....	14
Hill vs. Smith, 260 U. S. 592.....	7, 9
Hobbs vs. McLean, 117 U. S. 567.....	15
Hughes vs. Trustee, 6 Peters. 383.....	15
Ketchum vs. Duncan, 96 U. S. 659.....	15
Lake Superior R. R. vs. U. S., 93 U. S. 442.....	3
Lockwood vs. Ohio River R. R. Co., 103 Fed. 343.....	11
Lockwood vs. Ohio River R. R. Co., 180 U. S. 632.....	11
Lockwood vs. Ohio River R. R. Co., 140 Fed. 503.....	11
Long vs. Faulkner, 151 Ga. 837.....	11
L. & N. Ry. Co. vs. Maxey, 139 Ga. 541.....	11
L. & N. Ry. Co. vs. Tel. Co., 143 Ga. 331.....	11

	Pages
Martin vs. Branch, 6 Ga. 21.....	8
Mercantile Co. vs. Texas Ry., 216 Fed. 230.....	2
Merriam vs. Saalfeld, 241 U. S. 28.....	15
Montana vs. St. Louis, 204 U. S. 204.....	2
Nauman vs. Bradshaw, 193 Fed. 354.....	14
Platt vs. U. P. Ry., 99 U. S. 57.....	3
Prudential Ins. Co. vs. Cheek, 259 U. S. 530.....	8
R. R. Co. vs. Donovan, 104 Tenn. 465.....	11
R. R. Co. vs. Telford's Exor's. 89 Tenn. 293.....	11
Ratterman vs. W. U. T. Co., 127 U. S. 425.....	2
Rieves vs. Lamar, 94 Ga. 186.....	16
Roberts vs. Devane, 129 Ga. 608.....	14
Robertson vs. Pickerell, 109 U. S. 608.....	14
Rogers vs. Alabama, 192 U. S. 226.....	6
San Francisco vs. Lawton, 79 Am. Dec. 187.....	14
Security Co. vs. Dent 187 U. S. 237.....	2
Standard Oil Co. vs. Hawkins, 74 Fed. 395.....	15
Sturm vs. Boker, 150 U. S. 336.....	15
Thomas vs. R. R., 101 U. S. 83.....	3
Tobey vs. Bristol, 3 Story, 800.....	14
U. S. vs. U. P. R. R. Co. 160 U. S. 1.....	2
Union Central Life vs. Drake, 214 Fed. 536.....	15
Union Pacific vs. Chicago, 163 U. S. 581.....	16
Union Pacific vs. Mason City, 199 U. S. 160.....	3
Van Dyke vs. Geary, 244 U. S. 47.....	3
Western Union vs. Wright, 185 Fed. 250.....	2
Western Union vs. N. C. & St. L. Ry., 237 S. W. 64 (Tenn.).....	11
W. U. T. Co. vs. Penn. R. R. Co., 195 U. S. 549.....	11
W. U. T. Co. vs. Texas, 105 U. S. 464.....	2
Williams vs. Talladega, 225 U. S. 419.....	2
Williams vs. W. U. Ry. Co., 50 Wis. 71.....	11
Wisconsin R. R. vs. Forsythe, 159 U. S. 55.....	3
Yazoo R. R. Co. vs. Adams, 180 U. S. 1.....	6

**In the Supreme Court**

**of the**

**United States**

**October Term, 1923**

**WESTERN UNION TELEGRAPH  
COMPANY,**

**Petitioner**

**vs.**

**STATE OF GEORGIA**

**As Owner of Western & Atlantic Railroad**

**and**

**NASHVILLE, CHATTANOOGA &  
ST. LOUIS RAILWAY**

**As lessee operating said Railroad under  
the corporate name and style of**

**WESTERN & ATLANTIC  
RAILROAD**

**Respondents.**

**REPLY BRIEF FOR PETITIONER.**

The topical arrangement of this brief follows that of Respondent to which it refers.

**I.**

**Record Filed As Exhibit**

A copy of the entire record was, prior to the filing of the petition for certiorari, filed in this Court under



a praecipe upon a writ of error in the same cause which had been docketed. The praecipe requests the Clerk of the Supreme Court of Georgia "to prepare forthwith a certified transcript of the entire record in the above cause." The praecipe then specifies the entire record in detail. The record so filed will be taken as an exhibit to the petition for certiorari.

Security Trust Co. vs. Dent, 187 U. S. 237.

Montana Mining Co. vs. St. Louis Mining Co.,  
204 U. S. 204, 213.

## II.

### Public Interest.

The decree rendered in this cause, requiring the removal of all telegraph lines established and operated for about sixty (60) years from Atlanta to Chattanooga along the Western & Atlantic Railroad, affects matters of prime importance to the public and to the government.

(1) The transportation of messages both for the government and for the public as a common carrier.

Ratterman vs. W. U. T. Co., 127 U. S. 411, 425.

W. U. T. Co. vs. Wright, 185 Fed. 250, 251-4  
(5 C. C. A.).

(2) The performance of the duties of an agency or instrumentality adopted by the government in carrying out the powers vested in Congress.

W. U. Tel. Co. vs. Texas, 105 U. S. 460, h. n. 1, 464.

U. S. vs. P. R. R. Co., 160 U. S. 1, 36, 39, 41, 43, 44, 45-47.

Mercantile Co. vs. Texas Pacific, 216 Fed. 225, 230.

Williams vs. Talledaga, 226 U. S. 404, h. n. 1 and 6, page 419.

(3) The destruction of the reserved right of the

government in the service of this line, and the termination of the reserved interest of the government in the property itself.

Chicago Ry. vs. U. S., 217 U. S. 180, h. n. 3 and pages 185-188.

U. P. R. R. Co. vs. Mason City, 199 U. S. 160, 165.

Essex vs. Telegraph Co., 239 U. S. 313, 321-322.

Lake Superior vs. U. S. 93 U. S. 442, 446.

Platt vs. Union Pacific, 99 U. S. 48, 57.

Van Dyke vs. Geary, 244 U. S. 39, 47.

Gibbs vs. Gas Co., 130 U. S. 396, 410.

Thomas vs. Railroad Co., 101 U. S. 71, 83.

Wisconsin R. R. vs. Forsythe, 159 U. S. 46, 55.

### III.

#### **Petition For Certiorari Presented in Time**

A petition in due time was filed in the Supreme Court of Georgia for a rehearing of the cause.

On September 29th, 1923, the rehearing was denied by the Supreme Court of Georgia by the following language:

"Upon consideration of a motion for a re-hearing filed in this cause, it is ordered that it be hereby denied."

Time runs from the date of this order, September 29th, 1923.

Chicago Great Western R. R. Co. vs. Basham, 249 U. S. 164.

Citizens Bank vs. Opperman, 249 U. S. 448.

Andrews vs. Virginia Railway Co., 248 U. S. 272.

### IV.

#### **Constitutional Questions—"Full Faith and Credit," and Impairment of Contract Raised in Time.**

The decisions and statutes of Tennessee were plead in the answer and in the amended answer in the trial

court. (Petition side pages 15, 17, 18, 24, 83, 93, 107 and 113.)

Impairment of contract was alleged in the original answer and amendment. (Petition side pages 20, 86-89, 99, 102-107, 111, 114.)

On motion of these respondents the trial court struck these allegations of unconstitutionality. (Petition side pages 111, 116-117.)

Chief Justice Russell in his decision said:

"The plaintiff in error seeks to draw a distinction between its right *in Tennessee* and those as related in the portion of its line in the State of Georgia, contending that, in any event, it cannot be deprived of its right to use that portion of the line of the Western & Atlantic Railroad which is *within the State of Tennessee*. The privilege of making surveys in Tennessee was conferred 'upon the State of Georgia.' Acts of Tennessee Jan. 24, 1838, Cobb's Digest p. 420. The right to construct *in Tennessee* was given to the 'State of Georgia to be enjoyed and exercised by that State.' Acts of Tennessee, February 3, 1848, Cobb's Digest p. 421. Thus it will be seen that the grant from the State of Tennessee to the State of Georgia was without words of limitation. This being so, the Telegraph Company will not be heard to question the capacity in which the State of Georgia acquired these powers from the State of Tennessee, and certainly *this court* will not supply words of limitation upon that capacity where none was demanded by our sister state. The State of Tennessee at least recognized that Georgia was building the road as a sovereign state and that it was to own the right of way acquired by it, with the permission of the sister state, in its sovereign capacity and for this reason we think the same rule which

had been applied as to the claim of right of way or easement or franchise by the plaintiff in error as to the portion of the line in Georgia is likewise applicable to Tennessee—for this reason we reject the argument that the *cases cited from several jurisdictions* to sustain the proposition that the building and operation of the Western & Atlantic Railroad altered the status of Georgia as a sovereign State and reduced her to the same position in regard to this enterprise as she would have occupied as an individual."

Again Chief Justice Russell in his decision said:

"The plaintiff in error could under no view of the evidence adduced have maintained its claim to a franchise as against the State of Georgia upon the ground of prescription, as it contended, under color of title and open, notorious peaceable, adverse possession for a period of seven years—conceding for the sake of argument that they were rightfully in possession under some claim of right, there was not a sufficient length of time in which such possession existed as could ripen a prescriptive title. What we have said is upon the assumption that it be admitted that prescription can ripen against the sovereign State and that the statute of limitations can be applied to a commonwealth, neither of which we do admit. Of course any such proposition as that a sovereign State can be barred by the statute of limitations is denied by the well-known maxim *nullus tempus occurrit regi*."

Justice Custer in his opinion said:

"Upon the question as to whether or not prescription would ripen against the State, or the lapse of time could be made the basis of prescription, or as to whether the State lost its right to assert title to any part of its right of way by laches, we concur

in the ruling made by the members of the court in favor of affirmance, but not in all that is said by them in the discussion of the question."

A violation of the Constitution of the United States was generally alleged in paragraph 6 of the answer (petition side page 99), and quite particularly as to impairment of contracts and due process of law (side pages 104-106).

The full faith and credit clause of the Constitution was not in terms specified, but pleading the Tennessee decisions and statutes in the answer in the trial court and claiming the benefit thereof, with the further claim that the Constitution of the United States would be violated if the relief sought by the State of Georgia and its lessee were granted, inevitably invoked the applicable provision of the Constitution of the United States—the full faith and credit clause. Under the uniform decisions of this court these constitutional questions were sufficiently raised in the trial court, not only as to due process of law and impairment of contracts, but as to the full faith and credit to be accorded the Tennessee decisions and statutes.

Bridge Proprietors vs. Hoboken, 1 Wall. 116, 142, 143.

Rogers vs. Alabama, 192 U. S. 226, 230, 231.

Yazoo & M. Ry. Co. vs. Adams, 180 U. S. 1, 14-15.

Complaints that the Court in charging the jury did not charge as to the portion of the property in Tennessee in accordance with the laws of Tennessee is complained of in grounds 90, 91 and 92 of the motion for new trial filed by this petitioner. Tennessee statutes and decisions were plead in defense. The Tennessee statutes and

decisions were stricken. Full faith and credit was not given thereto. The unconstitutionality of these rulings are raised in the record. The Supreme Court of Georgia, evinced by the opinions of its Justices evidently recognized these questions as open and decided them. Under these circumstances this Court will review the ruling of the Supreme Court of Georgia denying this petitioner the benefit of the statutes and decisions of the State of Tennessee "without inquiring whether its Federal character was adequately called to the attention of the State trial court."

Hill vs. Smith, 260 U. S. 592, h. n. 1.

The amendment to 237 of the Judicial Code of February 17, 1922, provides that in a suit involving the validity of a contract a change in the rule of construction is a ground for review "if said claim is *made* in said court at any time before said final judgment is entered and if the decision is against the claim so made." The record shows that the claim was *made* in the Supreme Court of Georgia before final judgment and the decision thereafter rendered is against that claim.

The petition for writ of error docketed in the above cause within about three pages of the end of the petition contains the statement that this claim, directed to the Justices of the Supreme Court of Georgia, was filed in that Court before final decision in conformity with, and to obtain the benefit of, the amendment of February 17, 1922, to section 237 of the Judicial Code. The accompanying assignment of error IV. contains like statements. The petition for writ of error with the assignments of error were presented to the Chief Justice of the Supreme Court of Georgia, who, by formal order, allowed a writ of error. We think these facts in the record conclusively show not only that the claim was

filed in the Supreme Court of Georgia, but that the claim was presented to, and called to the attention of, the Justices, who considered the same, though the final order refusing a rehearing does not refer to it.

## V.

**Questions ordinarily raised by writ of error are considered by this Court when the case is before it on petition for certiorari and vice versa.**

Prudential Insurance Co. vs. Cheek, 259 U. S. 530, h. n. 6.

The amendment of February 17, 1922, to section 237 of the Judicial Code gives this court the same power and authority for review and determination as if the case had been brought up by writ of error.

## VI.

### **Impairment of Contracts.**

The contracts impaired were made in 1850, 1852 and 1870. The Georgia statute impairing the obligation of these contracts bears date November 30, 1915, clearly subsequent to the date of the contract.

The impairment is by statute. The decision of the Supreme Court enforces the impairment. See cases cited in our original brief side page 183-185.

In Martin vs. Broach, 6 Ga. 21, cited by respondents, the court referring to the Georgia constitutional provision said on page 27:

"This clause does not require that the title should contain a synopsis of the law, but that the act should contain no matter variant from the title."

The grant of right of way for a telegraph company is not matter variant from the title of the Act of 1852 in-



corporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company.

## VII.

### Post Roads Act of 1866.

The Post Roads Act bears date July 24, 1866. The Western Union Telegraph Company acquired title June 12, 1866, by assignment and transfer of the above mentioned contracts of 1850 and 1852. See Exhibit N. to motion for new trial. The Western Union Telegraph Company accepted the benefits of the Post Roads Act June 5, 1867. Exhibit P. P. motion for new trial. Subsequently the Western Union Telegraph Company acquired title directly from the State in 1870. In addition to this the answer claims that the State of Georgia had a right of way for railroad purposes only; that the title to the land and all other use and easements remained in the original owner against whom, as well as against the State of Georgia, the Western Union Telegraph Company and its predecessors in title acquired prescriptive title to easements for telgraph lines which did not interfere with the easements of the State of Georgia for railroad purposes. See authorities above cited relating to the Post Roads Act under topic II.

## VIII.

### Action of Western & Atlantic Railroad Commission.

On this subject we call attention to our original brief side pages 184, 185 and 189-203, 212-215.

In connection with what is said in our original brief about the lack of due process of law because of denial of presumptions in favor of this petitioner under the rules of procedure of the State Court and the placing of the burden of proof on this petitioner in opposition to these rules, we call attention to *Hill vs. Smith*, 260 U. S. 592, h. n. 2.

"A question of burden of proof may amount to a Federal question when intimately involving substantive rights in a Federal statute."

Respondents in the closing paragraph of this topic of their brief state that this petitioner has "had opportunity to be heard to assert his claims—in this litigation."

This petitioner asserted its claims in its answer and pleas both denying allegations of the petition and alleging matters in defense not shown in the petition. These defenses are summarized on side pages 14 to 25 of the petition, and more fully on side pages 81-116. These denials, and the matter alleged affirmatively in defense, were stricken on respondent's motion, and pertinent evidence mentioned in side pages 119 to 131 following the petition was excluded. These rulings were in contravention of the provisions of the Constitution of the United States, the opportunity to be heard and assert claims, if such it may be called, was a mere fleeting hope which vanished with its appearance.

## IX.

### **Ownership of the Western & Atlantic Railroad by the State of Georgia.**

Petitioner claims title to easements for its lines not only because of grants from the State of Georgia and occupancy under those grants, but it also claims title by adverse possession against the owners of the land and of every use therein other than an easement for railroad purposes, as well as title against the State of Georgia by reason of adverse possession. The statement to the opposite effect on page 18 of respondents' brief is erroneous as petitioner's answer and pleas in the trial court show.

The Georgia statutes authorized Georgia to acquire "right of way" for this railroad and provided for condemnation in the event right of way could not be acquired by agreement. Under both the Georgia and Tennessee decisions such right of way is a mere easement in land for railroad purposes, the title to the land itself and to every other use and easement remaining in the original land owner.

See *W. U. T. Co. vs. N. C. & St. L. Ry.*, 237 S. W. Rep., page 64, (Tenn.) citing and following:

*Railroad vs. Donovan*, 104 Tenn. 465, 477,  
*Railroad Co. vs. Telfords Executors*, 89 Tenn. 293,

*A. C. L. R. R. Co. vs. Postal*, 120 Ga. 268,  
*L. & N. R. R. Co. vs. Postal*, 143 Ga. 331.

See also

*Lockwood vs. Ohio River R. R. Co.*, 103 Fed. 243-5 (4 C. C. A.); *Certiorari refused*, 180 U. S. 637; *Southern Penn. Co. vs. Calf Creek Co.*, 140 Fed. 507; 513, 516,

*East Alabama Co. vs. Doe*, 114 U. S. 340, 349, 352,

*L. & N. R. R. Co. vs. Maxey*, 139 Ga. 542 h. n. 1,  
*Williams vs. W. U. T. Co.*, 50 Wis. 71,

*Central Ry. Co. vs. Standard Co.*, 144 Ga. 92, 94, 95,

*B. & W. R. R. Co. vs. Waycross*, 91 Ga. 573, 574, 576,

*A. B. & A. Ry. Co. vs. Coffee County*, 152 Ga. 432, 434,

*Long vs. Faulkner*, 151 Ga. 837,

*Calcasieu Co. vs. Harris*, 43 A. & E. R. R. Cases, 570.

*W. U. T. Co. vs. Penn. R. R. Co.*, 195 U. S. 540, is not in point. The contract in that case, covenant 13, prohib-

ited an assignment of the contract; covenant 15 provided for rescission of the contract upon default; covenant 16 stipulated that the telegraph company would remove its poles and wires from the railroad property upon the termination of the agreement, and, upon its failure to remove the same the railroad company could do so at the expense of the telegraph company. The contract also stipulated that any easement previously acquired by the telegraph company "is hereby relinquished and abandoned and the rights and easements of the telegraph company—shall be such only as are granted by this agreement and shall cease with its termination." See pages 542, 543-544.

Respondents on page 20 of their brief apparently claim abortive condemnation proceedings instituted, but dismissed by this petitioner, estop it from claiming the title asserted in its answer and pleas in this cause.

Without full knowledge of the facts this petitioner sought to institute condemnation proceedings. It gave notice of its intention to condemn, appointed an assessor and called on the lessee of the State and on the State to appoint an assessor. The lessee and the State refused to appoint an assessor and, by temporary injunction, enjoined petitioner from proceeding with condemnation. That injunction is still in force, and the cause in which it was rendered is still pending. The condemnation proceedings have been dismissed by petitioner. These condemnation proceedings were instituted without full knowledge of the facts, which were very obscure, under a belief that that proceeding afforded a remedy which has proved to be no remedy whatever. The respondents have not been induced to change their position by the attempted condemnation, but on the contrary, refused to participate therein, rendered it nugatory, and their status to-day

is what it was prior to the institution of those proceedings. While these respondents were permitted to introduce evidence relative to those condemnation proceedings, this petitioner was denied the right to introduce evidence explanatory of the circumstances under which it sought to institute those proceedings, its purpose in so doing, and its lack of knowledge of the facts and of all of the facts, and showing the circumstances and conditions rendering full ascertainment of the facts even now a practical impossibility. See the following grounds of motion for new trial:

Testimony of G. W. E. Atkins, ground 26.

Testimony of Arthur Heyman, grounds 31, 33 and 34.

Report of Confederate Telegraph Co., ground 46.

Testimony of Hon. Page Morris (U. S. District Judge), ground 53.

Butler's Historical Book, ground 54.

Reid's Historical Book, ground 55.

Testimony of Atkins and Heyman, ground 52.

Notice from L. & N. R. R. Co., ground 32.

Testimony relating to condemnation proceedings and equity causes, explanatory of and qualifying evidence introduced by these respondents, grounds 27, 28, 29 and 30.

Not only should the foregoing evidence have been admitted by due process of law in rebuttal, explanation and qualification of evidence introduced by these respondents; but the testimony so excluded shows that there was no abandonment by the Western Union Telegraph Company of such title and right as it possessed and which it claims in the present suit; nor was this petitioner thereby estopped from asserting in this suit the claims and demands plead by it.

The applicable doctrine is stated and discussed in 2

Pomeroy's Equity (3rd Ed.), section 802-812 and particularly section 805. The position here taken by this petitioner is also fully sustained by the following decisions:

Under the Georgia statute a condemnation proceeding amounts to a compulsory sale of such interest only as the defendant possessed. *Charleston Ry. vs. Hughes*, 105 Ga. 1, 13.

The only question open for determination is the value of defendant's interest in the land. *A. B. & A. R. R. Co. vs. Penny.*, 119 Ga. 479, 483.

Prior to award movant can dismiss without impairing its right to again institute such proceedings. *Central Co. vs. Nolan*, 135 Ga. 443.

Agreement for submission to arbitration prior to award is revocable by either party. *Harrell vs. Terrell*, 125 Ga. 379; *Tobey vs. Bristol*, 3 Story, 800, 823.

The attempted condemnation proceeding to obtain the equivalent of a quit claim is consistent with claim of title by condemnor and does not estop. *San Francisco vs. Lawton*, 79 Am. Dec. 187 (Field, afterward a Justice of this Court); *Robertson vs. Pickerell*, 109 U. S. 608, h. n. 6, 613, 614, 616, 617; *Gwinn vs. Smith*, 55 Ga. 145; *Roberts vs. Devane*, 129 Ga. 608.

The doctrine of election is inapplicable. *Bierce vs. Hutchins*, 205 U. S. 340, 346; *Nauman vs. Bradshaw*, 193 Fed. 354 (C. C. A.); *Barnsdall vs. Waltemeyer*, 142 Fed. 415, 420. (C. C. A.).

This petitioner had the right, without being estopped, to discontinue the first remedy and pursue another.

Standard Oil Co. vs. Hawkins, 74 Fed. 395 (C. C. A.); Union Central Life vs. Drake, 214 Fed. 536, 547-548 (C. C. A.); Bennecke vs. Insurance Company, 105 U. S. 355, 359.

The condemnation proceedings and any statements therein relied upon by respondents were but the assertion of a legal conclusion or opinion which does not estop. *Sturm vs. Boker*, 150 U. S. 336.

There being no intended deception or fraud, equitable estoppel does not result. *Hobbs vs. McLean*, 117 U. S. 580; *Crary vs. Dye*, 208 U. S. 521; *Brant vs. Va. Coal Co.*, 93 U. S. 326, 335, 336.

There was no mutuality. These respondents not only did not consent to the condemnation proceedings, did not agree to a submission for award, but refused to appoint an assessor and enjoined the proceedings. No estoppel results. *Merriam vs. Saalfeld*, 241 U. S. 28; *Hughes vs. Trustee*, 6 Peters, 383-4; *Gaither vs. Gaither*, 23 Ga. 521, 528.

These respondents did not rely on the representations or conduct in the condemnation proceedings, and did not change their conduct for the worse. Therefore estoppel does not result. *Bybee vs. R. R. Co.* 139 U. S. 681; *Bloomfield vs. Charter Oak*, 121 U. S. 135; *Ketchum vs. Duncan*, 96 U. S. 659, (h. n. 3), 666.

Even an express disclaimer, or admission of lack of title, does not estop, these respondents having been neither deceived or mislead thereby, nor having changed their position for the worse. *Frith vs. Siler*, 32 Ga. 665, h. n. 1; *Cain vs. Busbee*, 30 Ga. 714, h. n. 4; *Rieves vs. Lamar*, 94 Ga. 186.



A quasi-public corporation cannot estop itself from performance of its duties. *Union Pacific Ry. vs. Chicago*, 163 U. S. 581; *Gibbs vs. Gas Co.*, 130 U. S. 369, 410.

The following are pertinent paragraphs of the Georgia Code of 1910.

No. 5737: Estoppel as to title to real estate. Where the estoppel relates to the title to real estate, the party claiming to have been influenced by the other's acts or declarations must not only be ignorant of the true title, but also of any convenient means of acquiring such knowledge. Where both parties have equal knowledge or equal means of obtaining the truth, there is no estoppel.

No. 5738: Equitable estoppel. In order for an equitable estoppel to arise, there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence as to amount to constructive fraud, by which another has been misled to his injury.

The opinions of the Justices of the Supreme Court of Georgia indicate clearly that they did not consider this petitioner estopped by the condemnation proceedings which it sought to institute.

Respectfully submitted,

FRANCIS RAYMOND STARK,  
ARTHUR HEYMAN,  
WILLIAM L. CLAY,

*Attorneys for Petitioner.*

Service of the foregoing brief acknowledged. Copy received, this January 17, 1924.

*Attorneys for Respondents.*



JAN 27 1925

WM. H. STANSBURY  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1924 1925

**WESTERN UNION TELEGRAPH  
COMPANY,**

**Plaintiff in Error, and  
Petitioner for Writ of Certiorari.**

**vs.**

**STATE OF GEORGIA, as Owner of  
Western & Atlantic Railroad,**

**and**

**NASHVILLE, CHATTANOOGA &  
ST. LOUIS RAILWAY,**

**As Lessees operating said Railroad under  
the corporate name and style of West-  
ern & Atlantic Railroad,**

**Defendants in Error, and**

**Respondents to Petition for Writ  
of Certiorari.**

No. 243

24

**BRIEF FOR WESTERN UNION TELEGRAPH  
COMPANY**

**Plaintiff in Error and Petitioner for Writ of  
Certiorari.**

**JOHN G. MILBURN**  
(of New York, N. Y.)

**FRANCIS R. STARK,**  
(of New York, N. Y.)

**ARTHUR HEYMAN,**  
(of Atlanta, Ga.)

**WILLIAM L. CLAY**  
(of Savannah, Ga.)

**Attorneys for Western Union Telegraph Co.**



## I.

### CONTENTS.

#### CONSTITUTIONS, STATUTES AND CASES CITED.

Pages.

#### STATEMENT OF FACTS 1

The Federal question.....	2
How the Federal question was raised.....	4
Chronology of events from 1847 to date of suit (1920) .....	14
Garst & Bean contract.....	14
Augusta, Atlanta & Nashville Mag- netic Telegraph Company contract....	15
Contract of 1870.....	16

#### SPECIFICATION OF ERRORS RELIED ON.

## I.

Impairment of contract.....	19
-----------------------------	----

#### ARGUMENT.

## I.

If a perpetual right of way exists under any contract for telegraph lines on the Western & Atlantic Railroad, there can be no question that such contract is "impaired" by the Georgia acts of 1915 and 1916, as construed and applied by the courts below .....	26
Georgia statutes of 1915 and 1916, and the action of her W. & A. R. R. Commission, being by decree in this cause given a construction or application whereby a contract is impaired, this court takes jurisdiction .....	27

## II.

### CONTENTS.

Pages.

Silence of Supreme Court of Georgia upon constitutional questions raised not affect jurisdiction of this court.....	29
This court determines for itself validity and effect of Georgia act of 1852 to ascertain if contract claimed was in fact made.	30

## II.

A perpetual right of way was granted by such a contract as is entitled to the protection of the Federal constitution:	35
(a) Under the Garst & Bean contract..	35
(b) Under the charter of the Augusta, Atlanta & Nashville Magnetic Telegraph Company.....	35
(c) Under the contract of 1870.....	35
(a) Garst & Bean contract.....	36
Validity of Garst & Bean contract..	38
(b) Georgia statute of January 27, 1852, incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Co.....	41
Constitutionality of act of 1852.....	41
Prior Georgia decisions upholding constitutionality of act of 1852.....	42
Prior decisions control.....	43
Judgments by even division of Justices not binding on this court.....	48
Decisions of this court similar to Georgia's prior decisions.....	56

### III.

## CONTENTS.

Sections 6 and 9 of the act of 1852 are not matters different from what is expressed in the title.....	Pages. 57
Action and construction by executive and legislative departments upholding validity of act of 1852.....	62
Title of Garst & Bean and of Augusta, Atlanta & Nashville Magnetic Telegraph Company to easements transmitted to Western Union Telegraph Co.....	72
Acceptance of charter of A. A. & N. M. T. Co.....	73
(c) Contract of 1870.....	77
Contract of 1870 authorized.....	80
Contract of 1870 beneficial to Georgia	80

SUMMARY.	82
----------	----

APPENDIX.	86
-----------	----

Exhibit A, Garst & Bean contract.....	86
Exhibit B, statute of January 27, 1852, incorporating A. A. & N. M. T. Co.....	90
Exhibit C, contract of 1870.....	94
Exhibit D, act of November 30, 1915.....	100
Exhibit E, act of August 4, 1916.....	105
Exhibit F, resolution of W. & A. R. R. Commission .....	107



IV.  
**CONSTITUTIONS, STATUTES,  
 RESOLUTIONS AND CODE CITED.**

	Pages.
U. S. constitution, art. 1, sec. 10, par. 1....	5, 20,
	22
Georgia constitution 1798 Art. 1, Sec. 17.....	41
U. S. Rev. statutes, sec. 721.....	51
Georgia statutes Dec. 21, 1836.....	38
Dec. 27, 1837.....	38
Dec. 27, 1841.....	38
Dec. 22, 1843.....	39
Dec. 29, 1847.....	14
	( 2, 7,
Jan. 27, 1852.....	36, 39,
	41, 56,
	57, 62
Dec. 9, 1858.....	43
Dec. 17, 1896.....	45
Nov. 30, 1915.....	{ 4, 19,
	26, 27
Aug. 4, 1916 .....	{ 4, 19,
	26, 27
Georgia Resolutions A. D. 1887.....	78
Georgia Code 1863 Sec. 210.....	44
“ “ 1868 “ 204.....	44
“ “ 1873 “ 217.....	45
“ “ 1882 “ 217.....	45
“ “ 1895 “ 5588.....	45
“ “ 1910 “ 3645.....	37
“ “ 1911 “ 6207.....	46
“ “ 1911 “ 6208.....	46

# V.

## CASES CITED.

	Pages.
A. B. & A. Ry. Co. vs. Coffee County, 152 Ga. 432 .....	76
A. C. L. R. R. vs. Goldsboro, 232 U. S. 548 .....	29, 32
A. C. L. R. R. vs. Postal, 120 Ga. 268.....	82
Ainslie vs. Eason, 107 Ga. 747.....	37
Almand vs. Almand, 95 Ga. 204.....	55
Arkadelphia vs. St. Louis S. W. Ry. Co., 249 U. S. 134.....	29
Atlanta vs. Gate City G. L. Co., 71 Ga. 106 .....	74
Bailey vs. McAlpin ,122 Ga. 616.....	50
Baird vs. City of Atlanta, 131 Ga. 451.....	11
Beals vs. Hale, 4 How. 21.....	56
Benton vs. Singleton, 114 Ga. 548.....	10
Blair vs. Chicago, 201 U. S. 400.....	57
Bonner vs. Milledgeville Ry. Co., 123 Ga. 115 .....	43
Brantley vs. Perry, 120 Ga. 760.....	38
Bridge Proprietors vs. Hoboken Co., 1 Wall. 144 .....	28
Bucher vs. Cheshire R. R., 125 U. S. 555.....	51
Burgess vs. Seligman, 107 U. S. 33.....	53, 56
Brunswick R. R. Co. vs. Waycross, 91 Ga. 573 .....	77
Citizens Bank vs. Fort, 142 Ga. 611.....	49
Columbia Ry. vs. South Carolina, 261 U. S. 236 .....	27
Corn Products Refining Co. vs. Eddy, 249 U. S. 427.....	30
Cook vs. Prigden, 45 Ga. 340.....	38
14 C. J. 172.....	76

# VI. CASES CITED.

	Pages.
Dahnke-Walker Co. vs. Bondurant, 257 U. S. 282.....	30
Davis vs. Bank of Fulton, 31 Ga. 69.....	42, 48
Detroit vs. Detroit Ry., 184 U. S. 368.....	57
Detroit United Ry. vs. Michigan, 242 U. S. 238.....	32
Douglas vs. Kentucky, 168 U. S. 488.....	33
Elmendorf vs. Taylor, 10 Wheat. 160.....	52
Essex vs. New England Tel. Co., 239 U. S. 321.....	38, 70
Etheridge vs. Sperry, 139 U. S. 274.....	52
Farkas vs. Smith, 147 Ga. 503.....	43, 48
Fidelity & Deposit Co. vs. Nisbet, 119 Ga. 316 .....	47
Fletcher vs. Fuller, 120 U. S. 534.....	73
Gaston vs. Gainesville R. R. Co., 120 Ga. 516 .....	77
Gelpcke vs. Dubuque, 1 Wall. 205.....	53, 56
Georgia vs. Cinn. So. Ry., 248 U. S. 26.....	37
Georgia R. R. vs. Ivey, 73 Ga. 499.....	54
Ga. R. R. & Power Co. vs. Town of Decatur, 262 U. S. 432.....	32
Goldsmith vs. A. & S. R. R. Co., 62 Ga. 468 .....	42, 48
Goldsmith vs. Rome R. R. Co., 62 Ga. 473 .....	42, 48, 57
Greene vs. Neals, 6 Pet. 295.....	52
Heard vs. Russell, 59 Ga. 25.....	47
Holmes vs. Southern Ry., 145 Ga. 172.....	50
Hope vs. Mayor, 72 Ga. 246.....	43, 48
Houston & T. C. R. R. Co. vs. Texas, 177 U. S. 66.....	33
Howell vs. State, 71 Ga. 224.....	43, 63, 68
In Re F. & D. Co., 256 Fed. 73.....	56

# VII. CASES CITED.

	Pages.
Jackson vs .Chew, 12 Wh. 162.....	52
Johnson vs. Towsley, 13 Wall. 72.....	68
Josey vs. State, 148 Ga. 468.....	49
Larramore vs. Jones, 157 Ga. 366.....	12
Lloyd vs. Richardson, 158 Ga. 633.....	43, 48
L. & N. R. R. vs. W. U. T. Co., 250 U. S. 363 .....	40
Louisville vs. Cumberland Tel. Co., 224 U. S. 649 .....	38, 60
La. R. & N. Co. vs. New Orleans, 235 U. S. 164 .....	32
McKeen vs. Delancey's Lessee, 5 Cr. 33.....	52
McWhorter vs. Ford, 142 Ga. 554.....	50
Maxwell Land Grant Case, 121 U. S. 325.....	69
Montclair vs. Ramsdell, 107 U. S. 147.....	56
Muhlker vs. N. Y. & H. R. R., 197 U. S. 545 .....	52, 56
Northern Pacific vs. Duluth, 208 U. S. 583 .....	32
Ohio Life Ins. & Trust Co. vs. Debolt, 16 How. 416.....	34
Owensboro vs. Cumberland Tel. Co., 230 U. S. 58.....	38, 69
Palatine Ins. Co. vs. Dickenson, 116 Ga. 794 .....	10
Pease vs. Peck, 18 How. 598.....	53
Penn. vs. Thurman, 144 Ga. 67.....	50
Plumb vs. Christie, 103 Ga. 686.....	43
Polk's Lessee vs. Wendal, 9 Cr. 98.....	52
Railroad Commission vs. East Texas Railroad, 264 U. S. 79.....	33
Reinman vs. Little Rock, 237 U. S. 171.....	29
Roberts vs. Downing, 127 U. S. 607.....	68
Shaw vs. State, 60 Ga. 247.....	50
Sheffield vs. Collier, 3 Ga. 86.....	37

# VIII. CASES CITED.

	Pages.
S. F. & W. Ry. Co. vs. Postal, 115 Ga. 560 .....	82
Stearns vs. Minnesota, 179 U. S. 223.....	30
St. Paul Gas Light Co. vs. St. Paul, 181 U. S. 142.....	33
Stuart vs. Laird, 1 Cranch 299.....	68
Tameling vs. U. S. Co., 93 U. S. 644.....	69
U. S. vs. Alabama G. S. R. R. Co., 142 U. S. 615.....	68
U. S. vs. B. & O. R. R., 1 Hughes 138.....	38, 39, 64
U. S. vs. Chaves, 159 U. S. 452.....	73
U. S. vs. Devereaux, 90 Fed. 182 (4 C. C. A.) .....	73
U. S. vs. Des Moines Navigation Co., 142 U. S. 510.....	68
U. S. vs. Detroit L. Co., 200 U. S. 321.....	40
U. S. vs. Hermonos, 209 U. S. 337.....	68
U. S. vs. Philbrick, 120 U. S. 52.....	68
U. S. vs. Southern Pacific R. R. Co., 146 U. S. 570.....	40
U. S. vs. Johnson, 124 U. S. 253.....	68
3 Washburn Real Prop. sec. 2833.....	40
Wade vs. Travis Co., 174 U. S. 499.....	51
Warner vs. Strickland, 144 Ga. 547.....	49
Water Power Co. vs. Street Ry. Co., 172 U. S. 475.....	33
Wellborne vs. Estes, 70 Ga. 390.....	63
Wellborn vs. State, 114 Ga. 793.....	43
Wendham vs. McGuire, 51 Ga. 578.....	38
Western Union vs. W. & A. R. R. Co., 91 U. S. 283.....	17, 84
Wilcox vs. Jackson, 13 Pet. 498.....	39
Williams vs. Bruffy, 96 U. S. 176.....	28
Wilson vs. Snow, 228 U. S. 217.....	73
Winter vs. Jones, 10 Ga. 190.....	69







**IN THE  
Supreme Court of the United States**

**OCTOBER TERM, 1924.**

**WESTERN UNION TELEGRAPH  
COMPANY,**

**Plaintiff in Error, and  
Petitioner for Writ of Certiorari.**

**vs.**

**STATE OF GEORGIA, as Owner of  
Western & Atlantic Railroad,**

**and**

**NASHVILLE, CHATTANOOGA &  
ST. LOUIS RAILWAY,**

**As Lessees operating said Railroad  
under the corporate name and  
style of Western & Atlantic Rail-  
road,**

**Defendants in Error, and  
Respondents to Petition for Writ  
of Certiorari.**

**No. 243**

**BRIEF FOR WESTERN UNION TELEGRAPH  
COMPANY,**

**Plaintiff in Error and Petitioner for Writ of  
Certiorari.**

**STATEMENT OF FACTS.**

This is error (and certiorari) to the supreme court of Georgia, to review a judgment of that court (record, pg. 521) affirming by operation of

law (the court being equally divided, three to three) a decree of the superior court of Fulton county (record, pg. 335) directing the Western Union Telegraph Company to remove its telegraph lines from the right of way of the Western and Atlantic Railroad.

The Western and Atlantic Railroad, running from Atlanta, Ga., to Chattanooga, Tenn., is owned by the State of Georgia, and is leased to the Nashville, Chattanooga & St. Louis Railway.

### THE FEDERAL QUESTION

✓ / The Western Union lines along the Western and Atlantic Railroad are its trunk lines between Atlanta and Chattanooga and a vital artery of its national communication system. They have been maintained on the right of way of the State-owned railroad by the Western Union and its predecessors in title for nearly seventy years. It was and is the claim of the Western Union that it has a perpetual right of way for these lines by virtue of one or more of three separate contracts with the State of Georgia, which we may refer to as (1) the Garst and Bean contract; (2) the Augusta, Atlanta & Nashville Magnetic Telegraph Company charter; and (3) the contract of 1870 (Exhibits A, B and C, appendix pgs. 86, 90, 94). The present action, brought by the State of Georgia to compel the Western Union to remove its lines, was brought in pursuance of the direction of a statute of that State which became effective November 30, 1915,

↑

and an amendatory statute of August 4, 1916, pertinent portions of which statutes are printed in full in the appendix (Exhibits D and E, appendix, pgs. 100, 105). In substance, these statutes created an administrative body known as the Western and Atlantic Railroad Commission; charged it with the duty of determining the terms upon which the State-owned railroad should be leased; empowered it to determine what steps should be taken to assert the right of the State to any portion of the railroad right of way adversely used and occupied, and directed the commission to "deal with, and dispose of, any and all encroachments upon, and uses and occupancies of, any part of the right of way \* \* \* by any person other than the present lessee \* \* whether such encroachment, use or occupancy be permissive or adverse, and whether with or without claim of right therefor." The commission was also authorized by these acts "to take such action as it may deem proper and expedient to cause the removal and discontinuance of any encroachment \* \* \* which in its opinion should be removed or discontinued," and "to this end" it was authorized and empowered to bring such suits and other legal proceedings in the name of the State of Georgia as it might deem appropriate.

This Commission adopted a resolution (Exhibit F, appendix pg. 107) directing the institution of this suit.

It is the contention of the Western Union that these acts of the legislature of Georgia, as con-

+ strued and applied by the State courts in this suit, and the action of Georgia through her W. & A. R. R. Commission, impair the obligation of the two contracts made by Georgia with the predecessors in title of the Western Union and of the one contract made by Georgia directly with the Western Union, which have already been referred to, contrary to article 1, section 10, paragraph 1 of the Constitution of the United States.

### HOW THE FEDERAL QUESTION WAS RAISED.

The suit was commenced by a petition filed in the superior court of Fulton county, which set forth the Georgia act of 1915 and its amendment; alleged that, pursuant to said statutes, Georgia had leased this railroad to the Nashville, Chattanooga & St. Louis Railway for a term of fifty years by a lease dated May 11, 1917; alleged that "paragraph fourteen of said lease \* \* \* reserves to the State of Georgia the right to remove and cause to be discontinued any or all encroachments and other adverse uses and occupancies in and upon the right of way \* \* \* whether maintained under claim of right or otherwise, and to this end \* \* \* the lessee consented that the State may withhold delivery of possession, or right of possession, of such parts of the right of way \* \* as may be so adversely used and occupied until such encroachments and other adverse uses and occupancies shall have been removed or discontinued"; alleged

that the Western and Atlantic Railroad Commission, "pursuant to the authority and direction of said act" (record, pg. 77) had adopted a resolution authorizing the bringing of this suit in the name and behalf of the State of Georgia, and that "in accordance with such authority and direction from the Western and Atlantic Railroad Commission this suit is brought" (ibid). The contracts on which the Western Union relies for its title were not referred to in the petition. Accordingly, the defendant filed an answer setting up the three contracts in detail (record, pgs. 91 to 93) and alleged further that

"If the Georgia act of November 30, 1915, or any amendment thereto has the force and effect and delegates the authority" claimed by the State, "then said statute is opposed to the Constitutions of the United States and of Georgia \* \* \* and any judgment or decree of any court giving to said statute the force and effect" claimed by the State, "and any judgment or decree of any court granting the prayers of the petition in this cause will be violative of the Constitutions of Georgia and of the United States in that thereby

"(a) there will be an impairment of the obligations of contracts by a statute or law passed or made subsequently which violates \* \* \* United States Constitution, article 1, section 10, paragraph 1." (Record, pg. 107.)

The same defense is raised in defendant's separate affirmative plea, paragraph XXV. (record, pg. 169, 172).

Under the Georgia practice the point was properly raised, as a matter of pleading, by answer and plea: its legal sufficiency was properly tested by a motion to strike. The plaintiffs accordingly moved to strike various paragraphs of the answer and pleas, including the portion above quoted (see paragraphs 39, 40 and 41 of plaintiff's first motion to strike, record, pg. 130; and paragraph 59 of plaintiff's second motion to strike, record, pg. 194). These motions, so far as addressed to the portions of the answer and pleas above quoted, were granted (record, pgs. 131 and 195), and exceptions were duly taken by defendant (record, pgs. 133 and 196). These exceptions were preserved and insisted on in the supreme court of Georgia (bill of exceptions, record, pgs. 515, 518), and after the affirmance by that court were duly assigned as error (record, pg. 41).

A verdict and decree were rendered in favor of Georgia and her lessee requiring the Western Union to remove its lines "within twelve months from the final determination of this cause" (record, pgs. 535, 536).

A motion for new trial was filed in due time upon many grounds, complaining of error in rulings made during the trial and of error in verdict and decree (record, pgs. 515, 520).

Upon review by the Supreme Court of Georgia, a full bench of six justices evenly divided. Chief Justice Russell rendered one opinion concurred in by two other justices. Justice Custer rendered another opinion of diametrically opposite effect concurred in by two other justices.

With the exception of a discussion of the applicability of the doctrine of *nullum tempus occurrit regi*, the only question considered by either opinion, and upon the answers to which each opinion was entirely based, was:

Was the Garst and Bean contract, or the statutory contract with the A. A. & N. M. Tel. Co., a valid contract?

Justice Russell's decision does not consider the claim that these contracts were transferred to the Western Union. Justice Custer's decision considers this claim and holds that these contracts were so transferred.

The Supreme Court of Georgia considered

(a) The validity of the Garst & Bean contract, at the time it was made, depending upon whether the chief engineer of the railroad had authority to make it. The contract granted an unrestricted easement for telegraph lines along the railroad right of way.

(b) The validity of section six of the Georgia statute of 1852 incorporating the A.



A. & N. M. Telegraph Company which in terms expressly referred to and ratified the Garst and Bean contract.

(c) The validity of the grant by **section nine** of that act which, without reference to, and independently of, the Garst and Bean contract, granted a perpetual easement along the right of way of this railroad for telegraph lines of the A. A. & N. M. Tel. Co.

The determination of the answers to the last two questions, (b) and (c), depended in the opinion of all the justices upon the effect of this provision of the then constitution of Georgia—"nor shall any law or ordinance pass containing any matter different from what is expressed in the title thereof" (Georgia Constitution of 1798, article 1, section 17).

The title of the Georgia statute of 1852 referred to is "An act to incorporate the Augusta, Atlanta & Nashville Magnetic Telegraph Company."

Justice Russell's opinion is that the constitutional provision quoted rendered invalid sections 6 and 9 of the act of 1852, for the reason that the matter therein differs from that expressed in the title of the act. No prior Georgia decision was quoted or referred to in his opinion.

Justice Custer's opinion is of opposite effect, holding that sections 6 and 9 are not matter differ-

ent from that expressed in the title of the act and are valid. The opinion cites, quotes from and follows, unanimous decisions of the Supreme Court of Georgia and says:

"In maintaining that a reversal by this court is required by the errors of the court below, we plant ourselves upon the proposition that in parts of the plea and amendments stricken the defendant showed a right to the easement contested, by grant; that is, under the contract between Mitchell and Garst & Bean, as affirmed and ratified by the General Assembly. And we think that the transmission of this title through successive conveyances to this defendant could be shown in the way indicated in defendant's answer. The facts and circumstances pleaded should have been left for the consideration of the jury; and we are of the opinion that in view of those facts and circumstances pleaded, as well as the documents introduced which bore upon the question of title, the jury would have been authorized to find against the State; **especially in view of the one monumental, towering, dominating fact, that this defendant and its predecessors in title has for nearly three-quarters of a century been in the peaceable enjoyment of the easement, the right to which is now denied it. If in any case a grant should be presumed, it should be presumed in favor of this defendant under the facts alleged and proved in this record.**" (record, pg. 536).

Justice Russell's opinion, freely conceding that many errors had occurred during the trial (record, pg. 524), held that those errors were wholly immaterial because neither of these contracts was lawful or binding on Georgia (record, pgs. 524-526).

While Justice Russell's opinion does not so state, it does not deny, but seems to concede, that the Western Union had sufficiently deraigned and proved transition into itself of such title to these telegraph easements as Garst and Bean and the A. A. & N. M. Tel. Co. had acquired, but that as these grantees had acquired nothing, the result was that nothing had been transferred to the Western Union.

The Supreme Court of Georgia has repeatedly held that where its decision on one point will control a case before it on review, it will not consider or pass upon other questions duly presented even though its decision on those questions would sustain the error charged. In *Benton vs. Singleton*, 114 Ga. 548, the court said in headnote 4: "In no case will the Supreme Court undertake to pass upon questions presented by a bill of exceptions when an adjudication of them, even though favorable to the plaintiff in error, could not possibly result in any practical benefit to him." See also pages 557-558. In *Palatine Ins. Co. vs. Dickenson*, 116 Ga. 794, the Court said in the third headnote: "As the ruling made in the preceding headnote will result in a final disposition of the case, the other questions presented by the bill of exceptions will

not be now determined." To the same effect is Baird vs. City of Atlanta, 131 Ga. 451, h. n. 1.

Under this established practice of the Supreme Court of Georgia a determination of the validity of the Garst & Bean contract and of the statute of 1852 presented itself **at the outset** as one of the controlling features of the case.

Should the Supreme Court of Georgia hold this contract and statute to be invalid, that court, under its established practice, would not consider or pass upon the claimed transfer of the contract and rights thereunder to the Western Union.

Should that Court hold the contract and statute to be valid, then, and only in that event, would the Supreme Court of Georgia consider and pass upon the plead transfer of the contract with Garst & Bean and with the A. A. & N. M. T. Co. to the Western Union.

Therefore it is that Justice Russell's opinion, holding the Garst & Bean contract and the statute of 1852 to be invalid, did not attempt to pass upon the claimed transfer of those contracts to the Western Union, though freely conceding that many errors had occurred during the trial which the decision held, in conformity with the practice of the court, as above stated, were immaterial and that a judgment sustaining those claimed errors could not affect the judgment of the court.

Justice Custer's opinion, after holding the Garst & Bean contract and the statute of 1852 to be valid, then, pursuant to the practice of the Supreme Court of Georgia, considered and passed upon the plead transfer of those contracts to the Western Union, and held that the transfers were sufficiently plead, that the evidence offered would justify a verdict finding that those contracts and all rights thereunder had been lawfully transferred to the Western Union, and sustained the assignment of error on the striking of these portions of the plea and the exclusion of that evidence.

It therefore follows that the judgment of the Supreme Court of Georgia by a divided court, has sustained the verdict and decree of the lower court upon two grounds only:

1. The defense of prescriptive title and of laches is not available against the State of Georgia.
2. The Garst & Bean contract and the Georgia statute of 1852 are invalid.

The judgment of the supreme court of Georgia must be considered as limited to these two points only and as not passing upon other assignments of error not specified in its decision as adjudicated thereby. *Larrimore vs. Jones*, 157 Ga. 366, 369-371, and cases above cited.

For the purpose of this writ of error, therefore, it must be assumed that the rights of Garst &

Bean and of the A. A. & N. M. Tel. Co., if any, have been duly transferred to the Western Union.

As the case turned in the Supreme Court of Georgia, as above stated, solely upon the validity or invalidity of these contracts, we limit this brief to that point—the one point controlling each of the opinions of the Supreme Court of Georgia,—and to the contract of 1870 not referred to in either opinion.

The even division of the justices, by operation of law, affirmed the trial court.

A petition for rehearing (record, pg. 537), as amended (pg. 549), was denied without opinion (pg. 549). The denial of the petition for rehearing was on September 29, 1923. The original transcript of error and the printed record, pg. 549, erroneously state that the denial was on September 25, 1923. This error in the record is corrected by a stipulation of parties to the cause with a certificate of the Clerk of the Supreme Court of Georgia attached.

The case is here on writ of error, although out of abundant precaution certiorari was applied for, and consideration of the application postponed for hearing until the case is reached on the writ of error. We believe, however, that the point that the Georgia statute of 1915, and its amendment, impaired the obligation of one contract between the State of Georgia and the Western Union, and

the two contracts between the State of Georgia and the predecessors in title of the Western Union, is properly presented on writ of error.

### **CHRONOLOGY OF EVENTS FROM 1847 TO DATE OF SUIT (1920).**

The Western & Atlantic Railroad, the only railroad ever owned by Georgia, was built and, prior to 1850, operated without the aid of telegraphic service.

In 1847 Georgia, to encourage the construction and operation of lines of telegraph, by statute granted the right to construct and operate without time limit telegraph lines "on or by the side of any public road or highway in this State." (Ex. A. record, pg. 452).

**GARST & BEAN CONTRACT.** In A. D. 1850, Georgia, for the expressly stated purpose of obtaining telegraphic service essential to the efficient and safe operation of her railroad, contracted with Garst & Bean for the construction of a line of telegraph along this railroad from Atlanta to Chattanooga to be owned and operated by a corporation to be called Augusta, Atlanta and Nashville Magnetic Telegraph Company, and expressly granted the use of her railroad right of way without time limit for this purpose.

In 1850 this line of telegraph was constructed. (Ex. 1, record, pgs. 138, 280).



**AUGUSTA, ATLANTA & NASHVILLE MAGNETIC TELEGRAPH COMPANY CONTRACT.**—In A. D. 1852, Georgia by statute incorporated the Augusta, Atlanta & Nashville Magnetic Telegraph Company to construct and operate lines of telegraph between the cities mentioned in the corporate name and elsewhere.

**Section 6** of this statute expressly ratified the contract with Garst & Bean. (Bean was one of the named incorporators).

**Section 9** of this Act, without reference to this contract with Garst & Bean, granted the corporation the right to construct and maintain without limit lines of telegraph "along and across \* \* \* any railroad which now or may hereafter belong to this State." (record, pg. 280).

The Augusta, Atlanta & Nashville Magnetic Telegraphic Company was organized, accepted this charter, and maintained and operated its telegraph lines under these grants from Georgia (record, pg. 78).

The State of Georgia, and its lessees, have received and accepted continuous service from defendant and its predecessors in title by means of these telegraph lines in aid of the operation of the railroad.

It is alleged in the answer and pleas, and for the purposes of this writ of error must, we submit, be assumed by this court (in view of the striking out of the portions of the answer and pleas dealing with this question, and of the refusal of the supreme court of Georgia to determine whether such striking out was proper) that title to easements for this telegraph line passed into the Western Union Telegraph Company.

**CONTRACT OF 1870.** On August 18, 1870, a contract was made nominally by the W. & A. R. R., but in reality by the State of Georgia, approved by her Governor (infra pg. 78) with the Western Union Telegraph Company for the expressly stated purpose of providing "necessary telegraphic facilities" for her railroad, and for "a better understanding of the terms" on which the Western Union Telegraph Company "shall occupy the line of railroad \* \* \* with the line or lines of telegraph wires belonging to" the Western Union Telegraph Company, and to permanently settle and define the business relations between Georgia and the Western Union Telegraph Company. This contract in express terms gave the Western Union Telegraph Company a "perpetual right of way to erect and maintain telegraph lines along said railroad of as many wires as it may deem necessary to its business and additional lines of poles whenever" it desired them (record, pg. 93, Ex. 7, record, pg. 116).

Under her statute of October 24, 1870, Georgia made the first lease of her railroad dated December 27, 1870, for 20 years (record, pgs. 218, 219). The lessee thereunder claimed at the outset that it was not bound by Georgia's contract of August 18, 1870, with the Western Union Telegraph Company; that the wire set apart under that contract for Georgia's use for her railroad belonged to Georgia; and that the lessee could use it without paying for its use as provided in the contract. The lessee used the wire and refused to pay.

In 1872 the Western Union Telegraph Company filed a bill in the United States District Court at Atlanta to compel the lessee to pay as provided in the contract of August 18, 1870. Its claim was sustained by this court, 91 U. S. 283. Subsequently the lessee on September 11, 1876, paid as the contract provided; and that contract continued in force, the lessee using and paying as therein provided, until, by agreement between a subsequent lessee and the Western Union Telegraph Company, another working contract was, as between the lessee and the Western Union Telegraph Company, put in force in 1890 at the second lessee's request (record, pgs. 299-300). That however did not affect the contract of August 18, 1870, as between Georgia and the Western Union Telegraph Company, or the perpetual easement thereby granted.

Until the institution of the present suit, no action had ever been instituted to eject the Western Union Telegraph Company or its predecessors

from the right of way of this railroad, to question or dispute its or their title, or to interfere with the maintenance and operation of these lines of telegraph. The only suit ever instituted, in which any of the three contracts relied upon was involved, was the suit above mentioned in 1872 by the first lessee of the railroad.

From 1850 continuously these lines of telegraph have served Georgia and her railroad. The report of Mitchell, the Chief Engineer of the railroad, in 1850 (record, pg. 138), and testimony of MacDonald, the Chief Engineer of the present lessee, and an important witness of the plaintiff upon the trial (record, pg. 235), emphatically state that since 1850 these lines of telegraph were absolutely essential to the safe, speedy and economic operation of this railroad. They were entirely indispensable. The service they afforded was of great value.

Now, at the instance and at the expense of the present lessee, Georgia and its lessee seek to remove and destroy these telegraph lines. The Western Union Telegraph Company and its predecessors, servitors who, under grant in perpetuity, have for about seventy (70) years aided in making populous the forest wilds of north Georgia, and in establishing a great trunk line of communication of the northwest, suffering in so doing the financial stress of early unremunerative years, of four years of civil war and the following period of economic strain, are now awarded a decree annihilating these lines. The axe is about to fall. To this court an appeal is made.

## **SPECIFICATION OF ERRORS RELIED ON.**

### **I.**

#### **Impairment of Contract.**

Assignments of Error I, II, III complain of impairment of contracts by (a) the Georgia act of November 30, 1915, and its amendment, (Ass. Er. I), (b) Georgia's lease of 1917 pursuant to that act (Ass. Er. II), (c) action of Georgia's Western & Atlantic Railroad Commission (Ass. Er. III). Ground 1 of petition for certiorari is a consolidation of these three assignments of error.

Inasmuch as the contracts impaired and specified in each of the first three assignments of error are the same, the only difference being that the error is assigned separately upon the statute, the lease and the action of the W. & A. R. R. Commission, these three assignments are consolidated into one specification of error so as to relieve the court of reading what otherwise would be repeated. With this object in view specification I is thus stated.

(a) Georgia statute of Nov. 30, 1915, and its amendment of Aug. 4, 1916, impair contracts.

"Error is assigned upon the final judgment or decree of the Supreme Court of Georgia, being the

highest court of the State in the above cause where is drawn in question the validity of a statute on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of the validity of that statute, to wit:

"The statute of the General Assembly of Georgia entitled 'An Act to provide for the leasing or other disposition of the Western & Atlantic Railroad and its properties; for the creation of a commission to effectuate such purpose, and to define its powers and duties; making an appropriation for the cost of the work required, and for other purposes,' approved November 30, 1915, (Georgia Laws 1915, Extraordinary Session, pg. 119) and the amending act approved August 4th, 1916, each of which are in the petition in this cause alleged to be the foundation of this suit and the basis of the decree therein sought.

"Said statute and its amendment violates the Constitution of the United States, Art. 1, Sec. 10, Par. 1, in that the said statute of November 30, 1915, and its amendment, is a law passed by the State of Georgia impairing the obligation of a contract, and of each of the" contracts below stated. (Ass. Er. I, record, pg. 41).

(b) "Lease by Georgia to N. C. & St. L. Railway impairs contracts.

"Error is assigned upon the final decree or judgment of the Supreme Court of Georgia in the above cause, where is drawn in question the validity of an authority exercised under the State of Georgia on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of the validity of that authority, to wit:

"The lease of May 11, 1917, of the Western & Atlantic Railroad to the N. C. & St. L. Railway for a term of Fifty (50) years pursuant to the Georgia Act of November 30, 1915, plead in paragraph V of the petition and fully set forth in the brief of evidence. The said lease, an authority exercised under the State of Georgia, violates the Constitution of the United States, Art. 1, Sec. 10, Par. 1, in that it impairs the obligation of a contract, and of each of the" contracts below stated. (Ass. Er. II, record, pg. 46).

(c) "Action of Georgia through its Western & Atlantic Railroad Commission impairs contracts.

"Error is assigned upon the final judgment or decree of the Supreme Court of Georgia in the above cause, where is drawn in question the validity of an authority exercised under the State of Georgia on the ground of its being repugnant to the Constitution of the United States, and the de-



cision is in favor of the validity of that authority, to wit:

"The resolution of the Western & Atlantic Railroad Commission plead in paragraph VIII of the petition, and copy of which is attached as exhibit 14 to defendant's answer, declaring the Western Union Telegraph Company's lines to be an encroachment upon the right of way of the Western & Atlantic Railroad; declaring the Western Union Telegraph Company to be a trespasser on said right of way without right; and directing the institution of this suit for the removal of the lines of the Western Union Telegraph Company so that, in fulfillment of its obligation to its present lessee under the lease executed pursuant to the act of 1915, the State of Georgia may place in the possession of the N. C. & St. L. Ry., its present lessee, the very easements now occupied and possessed by the Western Union Telegraph Company.

"The said resolution, an authority exercised under the State of Georgia, violates the Constitution of the United States, Art. 1, Sec. 10, Par. 1, in that it impairs the obligation of a contract, and of each of the" contracts below stated. (Ass. Er. III, record, pg. 49).

The contracts whose obligations are violated are the following:

"1. A contract entered into October 11, 1850, between the State of Georgia and David W. Garst

and James M. Bean, a copy of which is attached to an amendment to defendant's answer.

"Georgia, by this contract, granted a perpetual, irrevocable and assignable easement for telegraph lines to Garst & Bean along the Western & Atlantic Railroad from Atlanta to Chattanooga.

"This contract was expressly plead in the original answer, paragraph VI (3), and in paragraph XVI amending the same; in defendant's separate plea in paragraph XX (2) of the amendment to its plea and answer, in the next to the last paragraph of that plea; in exhibit 22 (2) attached to the amendment to defendant's answer and plea and referred to in paragraph XXI, XXII, XXIII, XXIV thereof; and was again plead particularly in a separate plea in paragraph XXV (a) (2).

"2. The contract made with the Augusta, Atlanta & Nashville Magnetic Telegraph Company by the State of Georgia by the charter granted by act of the Legislature of Georgia entitled 'An Act to incorporate the Augusta, Atlanta & Nashville Magnetic Telegraph Company,' approved January 27, 1852, and particularly the two contracts made by section 6 and by section 9 of that act, to wit:

"Section 6 of that act in express terms ratified the above mentioned contract made by the State of Georgia with Garst & Bean October 11, 1850.

"Section 9 of that act, without reference to the Garst & Bean contract, gave a separate and dis-

inct grant in the following language: 'That the Augusta, Atlanta & Nashville Magnetic Telegraph Company shall have power and authority to set up their fixtures along and across any \* \* railroad which now or may hereafter belong to this State.'

"The easement granted was irrevocable, assignable and perpetual. This grant was without time limit.

"This contract was expressly plead in defense in the original answer, paragraph VI (3); in defendant's separate plea in paragraph XX (3) of the amendment to its answer and plea, and in the next to the last paragraph of that plea; in the exhibit 22 (3) attached to the amendment to defendant's answer and plea referred to in paragraphs XXI, XXII, XXIII, XXIV thereof; and was again particularly plead in a separate plea in paragraph XXV (a) (3).

"3. The contract between the State of Georgia signed in its behalf by its Governor and the Superintendent of the Western & Atlantic Railroad and duly sealed, and also signed by the Western Union Telegraph Company, dated August 18, 1870.

"The preamble of this contract recites that the agreement was entered into 'in order to provide necessary telegraph facilities for the party of the second part (W. & A. R. R.) and to a better understanding of the terms on which the party of the first part (W. U. T. Co.) shall occupy the line of

railroad of the party of the second part with the line or lines of telegraph wires belonging to the party of the first part, and to permanently settle and define the business relations between the respective parties hereto.' In the body of the contract is a grant from the State of Georgia to the Western Union Telegraph Company of a 'perpetual right of way to erect and maintain telegraph lines along said railroad of as many wires as it may deem necessary to its business and additional lines of poles whenever' the Western Union Telegraph Company shall so elect.

"This contract was expressly plead in defense in the original answer, paragraph VI (10) with a copy attached as exhibit 7; in defendant's separate plea in paragraph XX (11), and in the next to the last paragraph of that plea; in exhibit 22 (15) attached to the amendment to defendant's answer and plea, and referred to in paragraphs XXI, XXII, XXIII, XXIV thereof; and was again plead particularly in a separate plea in paragraph XXV (a) (4)." (Assignment of Error III, record, pg. 49).

Following the foregoing in the assignments of error, and in support of them, is a statement of various facts disclosed by the record.

## ARGUMENT.

### I.

**If a perpetual right of way exists, under any contract, for the telegraph lines on the Western & Atlantic Railroad, there can be no question that such contract is "impaired" by the Georgia Acts of 1915 and 1916, as construed and applied by the courts below.**

That a contract for a perpetual right of way is impaired by a legislative act, the effect of which is to require the owner of the right of way to remove its property therefrom, is too plain for discussion. That such is the legal effect of the Georgia acts of 1915 and 1916, as construed and applied, is equally clear.

These acts are the foundation of the suit. Without the suit, there could have been no decree directing the removal of the telegraph lines; without the act of 1915, as amended in 1916, there could have been no such suit. The petition in the Fulton County superior court expressly alleged that the suit was brought in accordance with the authority and direction from the Western and Atlantic Railroad Commission; that the Western and Atlantic Railroad Commission was created by the act of 1915, and given authority by the act of 1916 to deal with encroachments and institute and prosecute suits for their removal; and that the direction by the commission to its counsel to institute and prosecute the present suit was given by it "pur-

suant to the authority and direction of said act" (record, pg. 77.) No technical objection can therefore be urged that the alleged impairment of the contracts is solely by the judgment of a court as distinguished from the enactment of a State law. "It is apparent that the trial court gave effect to the act \* \* \* although the precise extent is not clearly disclosed," said this court in the recent case of Columbia Railway, etc., v. South Carolina, 261 U. S. 236, 246: "Whatever it was, it entered into and affected the judgment, and this judgment was affirmed by the supreme court." It cannot be denied, and we do not understand that counsel for the State undertake to deny, that the trial court gave some effect to the acts of 1915 and 1916, "pursuant to the authority and direction of" which, and pursuant to that alone, this suit was brought. The precise extent, indeed, is clearly disclosed. The act, as amended, was the whole foundation of the suit.

**Georgia statutes of 1915 and 1916, and the action of her W. & A. R. R. Commission, being by decree in this cause given a construction or application whereby a contract is impaired, this court takes jurisdiction.**

This court has held that if an Act of the State Legislature is by **judicial decree** given a construction whereby a contract is impaired, this court should take jurisdiction.

In *Bridge Proprietors vs. Hoboken Co.*, 1 Wall. 144, this court said:

"It is said, however, that it is not the validity of the act of 1860 which is complained of by plaintiffs, but the construction placed upon that act by the State court. If this construction is one which violates the plaintiffs' contract, and is the one on which the defendants are acting, it is clear that the plaintiffs have no relief except in this court, and that this court will not be discharging its duty to see that no State Legislature shall pass a law impairing the obligation of a contract, unless it takes jurisdiction of such cases."

On page 145 the court said:

"The act which was really the subject of construction, was the act of 1790, under which plaintiffs claim. For if that act **and the proceedings under it** amounted to a contract, and that contract prohibited the kind of structure which the defendants were about to erect under the act of 1860, then the latter act must be void as impairing that contract."

In *Williams vs. Bruffy*, 96 U. S. 176, this court said on page 184 "the constitutional provision prohibiting a state from passing a law equally prohibits a state from **enforcing** as a law an enactment of that character, from whatever source



originating," referring to enforcement by judicial decree.

This language is repeated in *A. C. L. R. R. Co. vs. Goldsboro*, 232 U. S. 555 and in *Reinman vs. Little Rock*, 237 U. S. 176, below cited.

Under the decisions of this court, not only the Georgia Statutes of November 30, 1915, and of August 4, 1916, but also the actions of the Western & Atlantic Railroad Commission and its resolutions, and the lease of 1917 to the N. C. & St. L. Ry., made pursuant to that Act and to those resolutions, each come within the inhibition of Article 1, Sec. 10, Par. 1, of the Constitution of the United States plead in defendant's answer prohibiting a state from passing a law impairing the obligation of a contract.

*Arkadelphia Co. vs. St. Louis & S. W. Ry. Co.*, 249 U. S. 134, 141 (order of State Railroad Commission).

*Reinman vs. Little Rock*, 237 U. S. 171, 176 (municipal ordinance).

*A. C. L. R. R. Co. vs. Goldsboro*, 232 U. S. 548, 555, (municipal ordinance).

**Silence of supreme court of Georgia upon constitutional questions raised not affect jurisdiction of this court.**

The silence of the supreme court of Georgia upon questions raised under the Constitution of

the United States does not affect those questions or the right of appeal to this court.

Corn Products Refining Co. vs. Eddy, 249  
U. S. 427, 432.

Dahnke-Walker Co. vs. Bondurant, 257  
U. S. 282, 289.

**This court determines for itself validity and effect of Georgia act of 1852 to ascertain if contract claimed was in fact made.**

While due deference is given by this court to the opinions and decisions of State courts, this court has always held that it must for itself decide, where impairment of a contract is claimed, whether in fact a contract did in the first instance exist. And this court has never hesitated or refused to reverse a decision or judgment of a State court holding that no contract existed, when this court reached the conclusion that there was a valid existing contract.

In Stearns vs. Minnesota, 179 U. S. 223, error to supreme court of Minnesota, the court said on page 233:

"The doctrine that this court possesses paramount authority, when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the Constitution, to determine for itself the existence or non-

existence of the contract set up, and whether its obligation has been impaired by the state enactment, has been affirmed in numerous other cases.

On page 232 this court said:

"The general rule of this court is to accept the construction of a State Constitution placed by the State Supreme Court as conclusive. One exception which has been constantly recognized is when the question of contract is presented. This court has always held that the competency of a state through its legislation to make an alleged contract, and the meaning and validity of such contract, were matters which, in discharging its duty under the Federal Constitution, it must determine for itself."

On pages 253 and 254 Mr. Justice Brown refers to the legality of the contract and says that the contract

"having been recognized by the legislature and the Supreme Court of Minnesota for thirty years, and also having been recognized as valid in the constitutional amendment of 1871, it is too late to set up its repugnance to the state constitution as against railways which were built upon the faith of its validity."

In *Northern Pacific vs. Duluth*, 208 U. S. 583, error to supreme court of Minnesota, on page 589-580 the jurisdiction of this court was questioned. The decision last cited was referred to and followed.

In *A. C. L. R. R. vs. Goldsboro*, 232 U. S. 548, error to Supreme Court North Carolina, an ordinance of a city was complained of as impairing a contract. On page 555 the court stated that the ordinance must be taken as legislation. On page 556 the question is whether a railroad charter was impaired by this ordinance. On that page the court said:

"When this court has under review the judgment of a state court, \* \* and the validity of a state law is challenged on the ground that it impairs the obligation of a contract, this court must determine for itself the existence or non-existence of the asserted contract, and whether its obligation has been impaired."

To the same effect are:

*Ga. R. R. & Power Co. vs. Town of Decatur*, 262 U. S. 432, 438, error to supreme court of Georgia.

*Detroit United Ry. vs. Michigan*, 242 U. S. 238, error to supreme court of Michigan, page 247, 248.

*La. R. & N. Co. vs. New Orleans*, 235 U. S. 164, 170, 171, error to supreme court of Louisiana.

St. Paul Gas Light Co. vs. St. Paul, 181  
U. S. 142, 147, error to supreme court  
of Minnesota.

Water Power Co. vs. Street Ry. Co. 172  
U. S. 475, 478, error to supreme court  
of South Carolina.

Douglas vs. Kentucky, 168 U. S. 488, 502,  
error to court of appeals of Kentucky.

Railroad Commission vs. East Texas R.  
R. Co., 264 U. S. 79, 86.

When the Act in question was held by the State court to be void because opposed to the **State Constitution**, this court, upon reaching the opposite opinion, has held the act valid under the **State Constitution**, and has reversed the state court.

In *Houston & T. C. R. R. Co. vs. Texas*, 177 U. S. 66, error to a court of civil appeals of Texas, the court on page 77 said:

"Thus we see that, although the decision of the state court was based upon the ground that the warrants in which these payments were made had been issued in utter violation of the **state constitution**, and were hence void, and that no payments made with such warrants had any validity, and although this ground of invalidity was arrived at without any reference made to the act of 1870, yet the necessary consequence of the judgment was that effect was thereby given to that act, and

in a manner which the company has always claimed to be illegal and unwarranted by the act when properly construed. The company has never accepted such a construction, but on the contrary has always opposed it, and raises the question in this proceeding at the very outset. Upon these facts this court has jurisdiction, and it is its duty to determine for itself the existence, construction and validity of the alleged contract, and also to determine whether, as construed by this court, it has been impaired by any subsequent state legislation to which effect has been given by the court below."

In *Ohio Life Ins. & Trust Co. vs. Debolt*, 16 How. 416, error to the supreme court of Ohio, the court on page 431 said:

"This brings me to the question more immediately before the court: Did the constitution of Ohio authorize its legislature, by contract, to exempt this company from its equal share of the public burdens during the continuance of its charter? The supreme court of Ohio, in the case before us, has decided that it did not. But this charter was granted while the constitution of 1802 was in force; and it is evident that this decision is in conflict with the uniform construction of that constitution during the whole period of its existence.

"And when the constitution of a State, for nearly half a century, has received one uniform and unquestioned construction by all the departments of the government, legislative, executive, and judicial, I think it must be regarded as the true one. It is true that this court always follows the decision of the state courts in the construction of their own constitution and laws. But where those decisions are in conflict, this court must determine between them. And certainly a construction acted on as undisputed for nearly fifty years by every department of the government, and supported by judicial decision, ought to be regarded as sufficient to give to the instrument a fixed and definite meaning. Contracts with the state authorities were made under it. And upon a question as to the validity of such a contract, the court, upon the soundest principles of justice, is bound to adopt the construction it received from the state authorities at the time the contract was made."

## II.

**A Perpetual Right of Way Was Granted by Such a Contract as Is Entitled to the Protection of the Federal Constitution:**

- (a) Under the Garst & Bean contract;
- (b) Under the charter of the Augusta, Atlanta and Nashville Magnetic Telegraph Company; and



**(c) Under the Contract of 1870.**

**(a)**

**Garst & Bean Contract of A. D. 1850.**

**Perpetual Easements Granted by Garst & Bean Contract and by Georgia's Act of 1852.**

The Garst & Bean Contract (record, pg. 138) was made by Georgia to procure the construction by Garst & Bean of the telegraph lines along the W. & A. R. R. so as to procure telegraphic service for that railroad. (Mitchell's report, record, pg. 138).

The granting clause is "grant you the use of our right of way for the telegraph company."

Section 6 of the Georgia statute of January 27, 1852, reads: "Be it further enacted that the contract entered into on the 11th day of October, 1850, by William L. Mitchell, Chief Engineer of the Western & Atlantic Railroad and D. W. Garst and J. M. Bean, on the part of said Company, be and the same is hereby ratified and affirmed."

The language of Section 9 of the same Act is "that the A. A. & N. M. T. Co. shall have power and authority to set up their fixtures along and across \* \* any railroad which now or may hereafter belong to this State."

There is no limit in the contract, or in the statute, to the period of use.

There can be no doubt under the language used in both the contract and the statute that the grant was of a perpetual, irrevocable, assignable easement.

Like language in a grant by a Georgia statute of an easement on this very railroad has been so construed by this court in *Georgia vs. Cinn. So. Ry.*, 248 U. S. 26, 29.

In *Sheffield vs. Collier*, 3 Ga. 86, the court held similar language to be, "a license to do something which in its own nature seems intended to be permanent and continuing. And it was the fault of the party himself, if he meant to reserve the power of revoking such a license after it was carried into effect, that he did not expressly reserve that right, when he granted the license, or limit it as to duration."

Georgia Code, paragraph 3645, reads:

"A parol license is primarily revocable at any time, if revocation does no harm to the person to whom it has been granted; but is not revocable when the licensee has executed it and in so doing has incurred expense. In such case it becomes an easement running with the land."

It has been held that this rule applies with greater force to a written grant or license.

*Ainslie vs. Eason*, 107 Ga. 747, 749.

To the same effect are:

Cook vs. Prigden, 45 Ga. 340.

Brantley vs. Perry, 120 Ga. 760.

Wendham vs. McGuire, 51 Ga. 578.

U. S. vs. B. & O. R. R., 1 Hughes, 145-147.

Louisville vs. Cumberland Tel. Co., 224

U. S. 649, 663, 664.

Owensboro vs. Cumberland Tel. Co. 230

U. S. 58, 65, 66. Quoted above pg.

Essex vs. New England Tel. Co., 239 U.

S. 321-322. Quoted above pg.

#### **Validity of Garst & Bean Contract.**

The contract of 1850 with Garst & Bean is valid for the reasons stated in ground 3 of the petition for rehearing in the supreme court of Georgia (record, pg. 543.)

The Georgia Act of December 21, 1836 (record, pg. 199, particularly Sec. 3, record, pg. 200) authorizes the Superintendent with the advice of the Engineer to contract for the construction of the railroad.

The Georgia Statute of December 23, 1837 (Sec. 2, record, pg. 202), appoints commissioners for the general superintendence of the construction of the railroad, &c.

The Georgia Statute of December 4, 1841 (Sec. 2 and 3, record, pg. 206), does away with the com-

missioners above mentioned and gives the powers previously exercised by them to a Chief Engineer and disbursing agent.

The Georgia Statute of December 22, 1843 (Sec. 2, record, pg. 207), vested the powers previously given to Commissioners, or the Governor or the Chief Engineer and disbursing agent, in "the Governor and Chief Engineer of said road." Sec. 3 of the same Statute charged the Chief Engineer with the duty of completing the railroad.

The Garst & Bean contract was signed by the Chief Engineer (record, pg. 139).

It was reported to the Governor of Georgia record, pg. 280).

In a very similar case it was held that the assent of the Governor was to be presumed.

U. S. vs. B. & O. R. R., 1 Hughes, 138, 144.

Wilcox vs. Jackson, 13 Pet. 498.

It is certain that the Governor of Georgia approved that contract because the ratifying Georgia Act of January 27, 1852, (record, pg. 280) was approved by the Governor of Georgia January 27, 1852.

When the Garst & Bean contract was made the Chief Engineer was acting under the Georgia Statute of December 22, 1843.

The report of the Chief Engineer, as well as the testimony of MacDonald (record, pgs. 138, 235-237) shows that it was imperatively necessary that the service of a line of telegraph be obtained for the successful, safe and economical operation of the railroad.

There can be no doubt but that the State and its railroad have received great benefit, service and value from this telegraph line, and from its owners.

The objection that the easement is uncertain and not definite is untenable. While the location of the line of telegraph is not definitely and minutely fixed in either the contract or the ratifying act, it became fixed and definite upon construction of the telegraph line.

L. & N. R. R. Co. vs. W. U. T. Co., 250  
U. S. 363 (h. n. 4), 366.

U. S. vs. So. Pac. R. R. Co., 146 U. S. 570  
(h. n. 2) 583-595.

U. S. vs. Detroit L. Co., 200 U. S. 321,  
331, 334.

In 3 Washburn on Real Property, Section 2333, it is stated that a grant of land without describing boundaries is made good and valid when the grantee takes possession, and that when "grantee takes possession of it, it ascertains the grant and gives effect to the deeds."

(b)

**Georgia statute of January 27, 1852, incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Co.**

Section 6 of the Statute of January 27, 1852, incorporating the A. A. & N. M. T. Co., expressly ratifies the contract with Garst & Bean.

Section 9 of that Act grants the created corporation perpetual easements for telegraph lines independently of the Garst & Bean contract.

**Constitutionality of act of 1852.**

The validity of these sections 6 and 9 of the Statute of 1852, ratifying the Garst & Bean contract and granting independently thereof perpetual easements, depends, in the opinion of the supreme court of Georgia, on the construction and effect of the provision of the then existing Georgia constitution, to wit:

“Nor shall any law or ordinance pass containing any matter different from what is expressed in the title thereof.”

Georgia Constitution of 1798, Art. 1, Sec. 17.

The title of the Act is

“An Act to incorporate the Augusta, Atlanta & Nashville Magnetic Telegraph Co.”

On this question the Justices are evenly divided. Each set of Justices has rendered an opinion, each of exactly opposite import.

The decision of Justice Russell, holding Sections 6 and 9 of the Statute unconstitutional, does not refer to any decision of the Supreme Court of Georgia.

**Prior Georgia decisions upholding constitutionality of act of 1852.**

In the decision of Justice Custer, and in ground 1 of the petition for rehearing in the Supreme Court of Georgia, it is claimed that, under former unanimous unreversed quoted decisions of the Supreme Court of Georgia, Sections 6 and 9 of the Statute of 1852 are constitutional; that thereby the contract with Garst & Bean was lawfully ratified, and that a lawful grant of perpetual easements was by that statute made to the A. A. & N. M. T. Co.

The Georgia decisions there cited and relied upon are

Goldsmith vs. Rome R. R. Co., 62 Ga. 473;  
quoted in record, pgs. 537-540; 534-535.

Davis vs. Bank of Fulton, 31 Ga. 69, quoted in record, pg. 540.

Goldsmith vs. A. & S. R. R. Co., 62 Ga. 468.



Hope vs. Mayor, 72 Ga. 246, quoted in record, pg. 549.

The above cases were decided prior to 1885.

Bonner vs. Milledgeville Ry. Co., 123 Ga. 115; quoted in record, pg. 540. (Decided 1905).

See also

Howell vs. State, 71 Ga. 224 (1873).

Plumb vs. Christie, 103 Ga. 686 h. n. 8, 700 (1898).

Wellborne vs. State, 114 Ga. 793 h. n. 5, 6, 820 (1902).

Farkas vs. Smith, 147 Ga. 503, 511-512 (1918).

Lloyd vs. Richardson, 158 Ga. 633 (July 3, 1924). See particularly pg. 635-637 reviewing prior decisions.

### **Prior decisions control.**

The Georgia law is that the foregoing decisions stand until set aside in the manner provided by law, and until then have the force and effect of a statute.

A statute of Georgia approved December 9, 1858, Georgia Laws 1858, pg. 74, reads:

"An Act to make uniform the decisions of the Supreme Court of this State; to regulate the reversals of the same, and for other purposes.

"1. Section 1. Be it enacted, That from and after the passage of this act the decisions of the Supreme Court of this State, which may have been heretofore, or which may hereafter be made by a full court, and in which all three of the Judges have or may concur, shall not be reversed, overruled or changed; but the same is hereby declared to be, and shall be considered, regarded and observed by all the courts of this State, as the law of this State, when it has not been changed by legislative enactment, as fully, and to have the same effect, as if the same had been enacted in terms by the General Assembly.

"2. Sec. 11. Repeals conflicting laws. Approved December 9, 1858."

Section 210 of the Georgia Code of 1863, adopted by the Legislature and having the force of a statute, provides:

"Sec. 210. A decision concurred in by three Judges cannot be reversed or materially changed, except by a full bench, and then after argument had, in which the decision by permission of the Court is expressly questioned and reviewed, and after such argument the Court in its decisions shall state distinctly whether it affirms, reverses or changes such decision."

This provision, without change, appears in each of the four subsequent Codes—of 1868, Sec. 204;

of 1873, Sec. 217; of 1882, Sec. 217; of 1895, Sec. 5588.

From the organization of the Supreme Court of Georgia until 1897 there were three Justices of that Court. By constitutional amendment ratified in 1896 the Justices of that Court were, from January 1, 1897, increased to six, the present number.

A statute of Georgia approved December 17, 1896, Georgia Laws 1896, pg. 42, provides:

"Sec. 3. \* \* In all cases decided by a full bench of six justices, the concurrence of a majority shall be essential to a judgment of reversal, and if the justices are evenly divided, the judgment of the court below shall stand affirmed."

"Sec. 5. Be it further enacted, That the law now embodied in section 217 of the Code of 1882, which declares that a decision concurred in by three judges cannot be reversed or materially changed, except by a full bench, be, and the same is, hereby amended by striking therefrom the words just quoted, and inserting in their stead the following words, to wit: 'a decision rendered by the Supreme Court prior to the first day of January, 1897, and concurred in by three judges, or justices, cannot be reversed or materially changed except by the concurrence of at least five jus-

trices.' Unanimous decisions hereafter rendered by a full bench of six justices shall not be overruled or materially modified except in the manner pointed out in said section, and then only with the concurrence of six justices."

Sections 6207 and 6208 of the Georgia Code of 1911, the present Code, read:

"6207. Decision of, how reversed. A decision rendered by the Supreme Court prior to the first day of January, 1897, and concurred in by three judges, or Justices, can not be reversed or materially changed except by the concurrence of at least five Justices. Unanimous decisions rendered after said date by a full bench of six shall not be overruled or materially modified except with the concurrence of six Justices, and then after argument had, in which the decision, by permission of the court, is expressly questioned and reviewed; and after such argument, the court in its decision shall state distinctly whether it affirms, reverses, or changes such decision."

"6208. Rule when the judges differ. If the court is not unanimous in its decisions, the judges shall deliver the opinions seriatim, but they shall not be required to write them out. The opinion of the majority shall decide each question. If but two judges preside, and they are divided in opinion, the cause shall be re-

argued before the remaining judge with a full bench, before the term closes, if possible. If not possible, the judgment of the court below shall stand affirmed, upon the certificate of the fact of the division of the court, unless the judge is absent from providential cause, in which event the cause shall stand continued."

Not only have the prior decisions above cited not been overruled or reversed, but there was no permission granted by the court to question or review them, nor was application therefor made.

In *Heard vs. Russell*, 59 Ga. 25, the court said on page 54:

"The decision complained of and inveighed against is a unanimous judgment, and until deliberately reviewed and overruled, it is as binding as an act of the Legislature." (Referring to Georgia Code Sec. 217).

In *Fidelity & Deposit Co. vs. Nisbet*, 119 Ga. 316, the court said on page 325:

"When this Court has by a unanimous decision decided the legal result of a given state of facts, it has established a precedent which, until the decision is reviewed and overruled, is bound to control any subsequent case in which the same question is presented on the same state of facts."

The certificate of even division of the Justices of the Supreme Court of Georgia, and the judg-

ment of that Court, appears on page 521 of the record.

**Judgment by even division of Justices not binding on this court.**

This court is not bound by the decision of Justice Russell, concurred in by two other Justices, nor by the judgment of the Supreme Court of Georgia affirming the judgment of the lower court upon equal division of its six Justices for the following reasons:

(1) The rule of construction binding on this court is that expressed in the earlier unanimous decisions of a full bench of the Georgia Supreme court prior to 1897 (decisions above cited in 31 Ga., 62 Ga., 72 Ga.), of five Justices in 1905 (one Justice being absent, 123 Ga. 115), and of six Justices in 1918 (147 Ga. 503, 512), and in 1924 (158 Ga. 633).

The opinion of Russell, C. J., is in conflict with each of these earlier decisions. The opinion of Custer, J., cites and follows them.

Neither the supreme court of Georgia, nor any court of that State, is bound by the opinion of Russell, C. J., but the law of Georgia requires all of its courts to follow the earlier decisions of its Supreme Court notwithstanding the opinion of Russell, C. J., and two associate Justices concurring, to the contrary.

In *Citizens Bank vs. Fort*, 142 Ga. 611, the court says:

“(a) That was a unanimous decision rendered when the court was composed of three Justices. In order to reverse it the concurrence of five Justices of the present bench is necessary (Civil Code (1910), Sec. 6207). That number do not concur in reversing it, and it stands as the decision of this court.”

In *Warner vs. Strickland*, 144 Ga. 547, the court says:

“(b) The decision in the case cited above was concurred in by the entire bench of six Justices. If there is any conflict between that and the ruling made in the later case of *Albright-Pryor Co. v. Pacific Selling Co.*, 126 Ga. 498 (4), 501 (55 S. E. 251, 115 Am. St. R. 108), decided by five Justices, the ruling in the latter case must yield to that in the former.”

In *Josey vs. The State*, 148 Ga. 468, the court says:

“(b) The decision in *Rainy v. State*, 100 Ga. 82 (27 S. E. 709), decided by three Justices on November 9, 1896, wherein a ruling was made contrary to the doctrine announced and followed in the prior decisions of this Court above cited, must, under the doctrine of stare decisis in force in this State (Civil Code Sec. 6207), yield to such former decisions.”



In *Bailey vs. McAlpin*, 122 Ga. 616, the court says in h. n. 7:

"7. The ruling in *Henderson v. Levy*, 52 Ga. 35, being concurred in by only two Judges, and the decision in *Richardson v. Whitworth*, 103 Ga. 741, being concurred in by only five Justices, are not controlling, and will not be followed, as they are in conflict with the ruling in *Morgan v. West*, 43 Ga. 275, which was a decision by three Judges."

Of similar import are:

*McWhorter vs. Ford*, 142 Ga. 554, h. n. 5.

*Penn. vs. Thurman*, 144 Ga. 67, 68 h. n. 7.

*Holmes vs. Sou. Ry.* 145 Ga. 172, h. n. 1.

*Shaw vs. State*, 60 Ga. 247, 254.

(2) The earlier decisions cited above, and in the opinion of Custer, J., have not been, as the statute preemptorily requires, "expressly questioned and reviewed" "by permission of this (Georgia supreme) court"; nor has this been sought by this defendant in error.

(3) The earlier decisions cited and followed by Custer, J., and the two Justices concurring with him, have not been reversed or changed by the supreme court of Georgia. To reverse or change them the statute requires, as above shown, the concurrence of five Justices as to unanimous decisions rendered prior to 1897, and the concurrence

of six Justices as to decisions rendered after January 1, 1897.

(4) These earlier unreversed decisions of the supreme court of Georgia bind this court, notwithstanding the decision of Justice Russell concurred in by two associate Justices, and the judgment of the supreme court of Georgia upon equal division of its Justices.

Section 721 of U. S. Rev. Stat. provides that "the laws of the several states \* \* shall be regarded as rules of decision \* \* in the courts of the United States."

"It has been held \* \* that the decisions of the highest court of a state in regard to the validity or meaning of the Constitution of that state or its statute, are to be considered as the law of that state within the requirement of that section."

Bucher vs. Cheshire, R. R., 125 U. S. 555, 582-3.

Wade vs. Travis Co., 174 U. S. 499, 508.

(5) The decisions of a state court binding the such decisions of the state court of last resort as Supreme Court of the United States are limited to are settled and as constitute a settled construction. Oscillating decisions are not controlling. The even division of the Justices in this case is not a settled construction. It oscillates from the earlier controlling decisions.

Etheridge vs. Sperry, 139 U. S. 274, 276. "Settled law \* \* as established by decisions of its highest courts." "Settled construction \* \* of the highest court."

Muhlker vs. N. Y. H. R. R. 197 U. S. 545, h. n. 4,

"This court determines for itself whether there is an existing contract, \* \* where there is a diversity of state decisions, the first in time may constitute the obligation of the contract, and the measure of rights under it."

The point is also involved in the following cases, which however originated in Federal courts:

McKeen vs. Delancey's Lessee, 5 Cr. 33, "construction was universally received."

Polk's Lessee vs. Wendal, 9 Cr. 98, "where that construction is settled."

Elmendorf vs. Taylor, 10 Wh. 160, 165, "settled." "Conflicting opinions." "Uniformly decided." "Settled finally."

Jackson vs. Chew, 12 Wh. 162, 167, 168, "Settled." "At rest there." "Highest court." "Settled rules." "Settled course of adjudications."

Greene vs. Neals, 6 Pet. 295, 297, 298, 299, "Settled construction." "A fixed and received construction. \* \* Makes a part of such statutes

law." "Highest judicial tribunal." "A fixed rule of property."

Pease vs. Peck, 18 How. 598, 599, "Settled construction of the laws of a state by its highest judicature." "When the decisions of the State court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions." "Such decisions have not the character of established precedent declaratory of a settled law of a state."

Gelpcke vs. Dubuque, 1 Wall. 205, 206, "Settled adjudications." "The earlier decisions, we think, are settled by reason and authority." "The sound and true rule is, that if the contract, when made, was valid by the laws of the state, as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decisions of its courts altering the construction of the law."

Burgess vs. Seligman, 107 U. S. 33, "Established rules." "Where the law has not been thus settled it is the right and duty of the Federal courts to exercise their own judgment." "When contracts and transactions have been entered into, and rights have accrued thereon under the particular state of the decisions, and of the state tribunals the Fed-

eral courts properly claim the right to adopt their own interpretation of the law applicable to the case, although different interpretations may be adopted by the state courts after such rights have accrued."

6. The decision of a supreme court of a state at variance with earlier decisions under which rights have accrued need not be followed. Vested rights should not be so destroyed.

In *Georgia R. R. vs. Ivey*, 73 Ga. 499, it was sought to review a prior decision. The supreme court on page 501-502 said:

"It did not fail to strike such counsel that a principle decided nine years ago, and recognized so long as law in subsequent opinions of a bench changing in its personnel, too, as ours does so often, was planted so long and had taken root so deeply in our Georgia jurisprudence as to render it aged, if not venerable, and that possibly the principle *stare decisis* would so encrust the trunk as to make it impervious to any axe, however heavy and sharp, though wielded with muscles however strong and trained. It was, therefore, argued that no property had passed, and no rights been vested under this decision, and, therefore, that the weight of the doctrine of *stare decisis* did not bear on the case reversed. It is our opinion that the doctrine is as applicable here as in other cases. A construction of a statute \* \*

was given in that case by a unanimous bench, and became settled law; it entered into every contract between master and servant; it fixed the liability of the master," etc.

In *Almand vs. Almand*, 95 Ga. 204, the court on page 206 stated that prior unreversed decisions constitute the law, and on page 207 said:

"Aside from these considerations, there is another cogent reason why the principle of these decisions should not be disturbed. It became many years ago engrafted upon and is now deeply embedded in the jurisprudence of this State. The courts have uniformly administered the law with reference to it. Important property rights have grown up under it; and to justify the court now to set aside such a uniform current of decisions, it should be satisfied by the most convincing logic that the principle is itself unsound, and as well vicious in its effect. The doctrine of *stare decisis* is a conservative one. Its application is essential to the permanence of a well ordered system of jurisprudence. It gives the public confidence in the stability of the law, and, even in doubtful cases, it is of infinitely greater importance to public as well as private interests that the law should be definitely settled, affording a fixed rule of conduct, than that it be settled in a particular way."

To the same effect see *Gelpcke vs. Dubuque*, 1 Wall. 205; *Burgess vs. Seligman*, 107 U. S. 33; *Muhlker vs. N. Y. & N. H. R. R. Co.*, 197 U. S. 545, cited above.

7. The judgment of the supreme court of Georgia, only by division of its Justices, affirms the judgment of the lower court. The judgment of that lower court, even though it has become final, does not bind this court.

*Beals vs. Hale*, 4 How. 21, 54.

*In Re F. & D. Co.*, 256 Fed. 73, 76.

See also decisions above cited to the effect that only the decision of the court of last resort control.

**Decisions of this court similar to Georgia's  
prior decisions.**

The Georgia decisions above cited, establishing the rule that Sections 6 and 9 of the Georgia Act of 1852 (incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company) is not matter different from what is expressed in the title of that act, are in full accord with the decisions of this court.

*Montclair vs. Ramsdell*, 107 U. S. 147, 155, is of the same tenor as the Georgia cases cited and is provingly quoted and followed in *Hope vs. Mayor*, 72 Ga. 246, 250. (Quoted in the record, pg. 549).



Of like import are:

Detroit vs. Detroit Ry., 184 U. S. 368, 391-392;

Blair vs. Chicago, 201 U. S. 400, 451.

These decisions, both of the supreme court of Georgia and of this court, fully sustain the decision of Justice Custer and the two Justices concurring with him.

**Sections 6 and 9 of the act of 1852 are not matters different from what is expressed in the title.**

The title of the Act is "An Act to incorporate the A. A. & N. M. T. Co."

In Goldsmith vs. Rome R. R. Co., 62 Ga., followed by Justice Custer, (record, pg. 534) it is stated "the charter of a private corporation is a contract as between the State and the corporation, and the stipulations, terms and conditions of a contract are to be looked for in the body of the instrument and not in the title or caption."

The same decision quoted by Justice Custer, (record, pg. 535) says: "What do we mean by 'an Act to incorporate' a railroad company? Suppose a bill to be entitled 'An Act to incorporate the Rome Railroad Company' should be offered in the legislature, what would the legislators present understand such a bill to be? What would they think was intended by it? What is expressed in the

title of that sort of bill? In legal parlance, it means that the author of the bill proposes to make an artificial person, or to create a corporation for the purpose of constructing and operating a railroad, and to clothe it with such attributes and powers, and impose upon it such duties and liabilities, and to grant it such privileges and immunities, as in the judgment of the legislature will be necessary or proper, or appropriate for such enterprise. The very nature of a corporation indicates that such is a correct view of the objects and scope of an act of incorporation."

Justice Custer, on page 535, after quoting the above decision, says:

"Under the views here expressed, the court below erred in striking, upon motion of the plaintiffs, the part of the defendant's answer which set up the grant of an easement along the Western & Atlantic Railroad by express contract, subsequently ratified by the legislature."

On page 534 Justice Custer says:

"Can it be doubted that under that title (of the Act of 1852) it was competent for the legislature to make \* \* provisions for authority to connect with other lines, and provide that it might run along or across highways \* \* "

"Section 6 of the Act declares that a certain contract shall be ratified, and that is the very contract that made the existence of the company most

feasible and possible, and the plan for bringing into existence the telegraph line feasible."

Section 9 of the Act of 1852 grants to the corporation thereby incorporated easements without limit along any railroad owned, then or subsequently, by Georgia. The W. & A. R. R., then in existence and in operation, was then owned by Georgia.

Clearly a telegraph company could neither be constructed nor operated without easements in land for the maintenance of its lines. A provision in the incorporating act for such easements is not matter different from what is contained in the title. Moreover the title indicates that the legislative purpose was to create a quasi public corporation not merely for the private gain of the incorporators, but also for the public benefit and welfare. The title indicates that the line of telegraph would be established between Atlanta & Nashville. Geographical conditions, well known to the public and to the legislature, necessarily indicated that the line would run from Atlanta to Chattanooga in piercing the Blue Ridge mountains to reach Nashville, named in the charter. The W. & A. R. R. was the then great highway of that route.

The very next act in the Georgia laws of 1851-1852 incorporating the Rome Branch Magnetic Telegraph Company, Sec. 8, page 199, provides "that the Rome Branch Magnetic Telegraph Com-

pany shall have power and authority to set up their fixtures along the railroad." The Act of 1847 printed in the record, pg. 452, "to authorize the construction of the Magnetic Telegraph Co." provides "that any company or individual may erect posts and wires and other fixtures for telegraph purposes on, or by the side of any road, or highway in this State." Clearly then, at the time of the passage of the act incorporating the A. A. & N. M. T. Co., it was the well known policy of Georgia to permit the construction of telegraph lines along railroads and highways as a matter of public policy for the public welfare.

In *Louisville vs. Cumberland Tel. Co.*, 224 U. S. 649, it is stated, page 650, that in 1886 the Legislature of Kentucky chartered the O. V. Tel. Co. without limiting its corporate existence and authorized it "to purchase or acquire and dispose of real estate \* \* rights and franchises relating to such business," and granted it the power to "construct, equip and maintain said telephone systems and exchanges, erect poles and string wires thereon, and operate its telephone lines over, along, or under any highway, street or alley of the City of Louisville with and by the consent \* \* of said City." An ordinance of the City Council in 1866 ratified that legislative grant. Under the then constitution the legislature was not required to provide that its grant should be subject to the assent of the city. (page 658).

This court, page 661, stated that among the franchises given the telephone company by its charter was "the right to use the streets in the city for the purpose necessary in conducting a telephone business. Such a street franchise has been called by various names—an incorporeal hereditament, an interest in land, an easement, a right of way—but, howsoever designated, it is property—being property it was taxable, alienable and transferable."

And on page 663: "In considering the duration of such a franchise **it is necessary to consider that a telephone system cannot be operated without the use of poles, conduits, wires and fixtures.** These structures are permanent in their nature and require a large investment for their erection and construction. To say that the right to maintain these appliances was only a license, which could be revoked at will, **would operate to nullify the charter itself, and thus defeat the State's purpose to secure a telephone system for public use.** For manifestly, no one would have been willing to incur the heavy expense of installing these necessary and costly fixtures if they were removable at will of the city and the utility and value of the entire plant be thereby destroyed. Such a construction of the charter cannot be supported, either from a practical or technical standpoint.

"This grant was not at will, nor for years, nor for the life of the city. Neither was it made ter-

minable upon the happening of a future event, but it was a necessary and integral part of the other franchises conferred upon the company, all of which were perpetual and none of which could be exercised without this essential right to use the streets. The duration of the public business in which these permanent structures were to be used, \* \* \* compel a holding that the State of Kentucky conferred upon the Ohio Valley Telephone Company the right to use the streets to the extent and for the period necessary to enable the company to perform the perpetual obligation to maintain and conduct a telephone system in the City of Louisville. Such has been the uniform holding of courts construing similar grants to like corporations."

Clearly the provisions of Sections 6 and 9 of the Act of 1852 incorporating the A. A. & N. M. T. Co. are emphatically germane to the title of the act and do not constitute "matter different from what is expressed in the title."

**Action and construction by executive and legislative departments upholding validity of act of 1852.**

The interpretation upholding the validity of Sections 6 and 9 of the Act of 1852, and upholding the validity of the contract of 1870, is supported by the acquiescence of the various departments of Georgia in the construction and maintenance of these telegraph lines under the Garst & Bean contract in the year 1850 or 1851; under the ratifying

act of 1852; under the contract of August 18, 1870; by their acquiescence in the use of necessary easements by the grantees under those contracts; and by their acquiescence in the operation of those lines with continuously accruing benefit to the State of Georgia. Such collateral interpretation is entitled to great weight even when a statute is assailed on the ground of unconstitutionality.

In *Howell vs. State*, 71 Ga., 224, an act was attacked upon the ground that the act contained matter different from what is expressed in the title thereof, the identical constitutional provision invoked by Georgia and its lessee in respect to the Georgia Statute of 1852. In considering this question the court said, on page 229:

"The practice of the various departments of the government, as a means of collateral interpretations, is not to be rejected by the courts, in passing upon the constitutionality of a law. It is entitled to consideration and weight, especially in view of another settled rule, that a law is not to be set aside unless its conflict with the provisions of the constitution is plain and obvious. *Wellborn vs. Estes*, 70 Ga. 390."

In *Wellborne vs. Estes*, 70 Ga. 390, the court, in considering a claimed unconstitutionality of a Georgia statute, said on page 396:

"In determining questions of such moment and delicacy as those here presented, we feel



bound to proceed with great caution, and not to set aside the action of a co-ordinate department of the government, except where the conflict between that action and the fundamental law is clear and palpable. It must be so apparent as to leave no reasonable doubt as to its existence upon the judicial mind."

The case of U. S. vs. B. & O. R. R. Co., 1 Hughes 138, is, in many respects, similar to the case now before this court. A grant by the Secretary of War was questioned.

On page 143 the court said:

"The government having in all its branches acquiesced in this action of the War Department, she should not be permitted to change her position with reference to this property, but her rights should be determined according to the construction heretofore given the act, which seems to me not only to be warranted by its terms, but does no violence to the language employed to express its object."

On page 145 the court said:

"The license granted was for an indefinite period, no time being fixed when the permission to use the lands for the purpose specified in the agreement was to terminate. Up to this time it has never been revoked, nor has any notice been given by the government of its intention or even its desire to revoke it, until the institution of this suit.

"The defendant accepted this license upon the terms indicated. It built and constructed its railroad under this authority. It was the extension of a great national highway, and as we now know, second to none in magnitude and importance in this or any other country. It must have been apparent to both the contracting parties that an enterprise at that time so stupendous in its character as the construction of a railroad from Baltimore to the Ohio River, was to be permanent and lasting. A right thus acquired, under a written license not specially restricted, is commensurate with the thing of which the license is an accessory.

\* \* \*

"The inference is clear to my mind that it was the intention of the Secretary of War to dedicate the property granted under this license to this specific use, which was a public one. It was for a great national highway. Having so donated and declared the purposes and object of the donation, it became dedicated to the specific purposes indicated."

On page 146 the court said:

"By this act upon the part of the United States, through their agent, the defendant, as well as the public through it, has acquired an easement in the property, so long as it continues to use it for the purposes granted, which is said 'to be a liberty, privilege, or ad-

vantage which one may have in the lands of another without profit.' The owner of the fee, whoever he may be, can not revoke the license granted. The fee will remain in the original owner, or his grantees, but the right of the defendant to the use is paramount to the title of the owner of the fee, and does not require the fee for its protection. \* \*

"The plaintiffs were influenced in granting the license by the benefits to be derived from the construction of the road in furnishing them with better facilities of transportation at reduced rates. \* \*

"It is here that equity interposes her power to estop the complainant from disturbing the defendant in the rights acquired by it under the agreement, otherwise it would have no remedy. It is now the settled doctrine that 'equity will execute every agreement, for the breach of which damages may be recovered, when an action for damages would be an inadequate remedy.' In this case no adequate compensation could be made the defendant for the damages it would sustain by the revocation of its license and the loss of rights acquired under it. The complainant having without objection permitted the defendant to construct over their lands a public railroad, 'cannot, after the road is completed, or large expenditures have been made thereon, upon

the faith of their apparent acquiescence, reclaim the land or enjoin its use by the railroad company.' *Goodwin v. Cincinnati and White-water Canal Company*, 18 Ohio St. 169; *Cumberland Valley Railroad Company v. McLanahan*, 59 Penn., 24, 31. And this doctrine is reaffirmed in 21 Ohio, 553, in which case the learned court declare that 'it is the dictate of natural justice that he who, having a right or interest, by his conduct influences another to act on the faith of its non-existence or that it will not be asserted, shall not be allowed afterwards to maintain it to his prejudice.' Out of this principle has grown the equitable doctrine of estoppel in pais, so well stated and strongly approved by Fonblanque in his *Treatise on Equity*, vol. I, chap. 3, sec. 4; by Chancellor Kent in *Wendell v. Van Rensselaer*, 1 Johns. Ch., 344; by Lord Macclesfield in the leading case of *Savage v. Foster*, 9 Modern R., 35.

"In the case under consideration, no one can question the fact that the defendant was influenced in the course it pursued by the conduct of the government through its officer, the Secretary of War. The Company entered upon the premises under its agreement with the government, and remained in the peaceable possession and the quiet enjoyment of them for a period of upwards of thirty years. During all this time not the slightest intima-

tion was ever given to it of any claim whatever upon the part of the government to the disputed premises. I therefore conclude that, upon every principle, both legal and equitable, the complainants cannot and ought not to be permitted at this late day to disturb the defendant in the possession of the premises under the agreement of 1838."

In the following cases the rule of collateral interpretation announced in 71 Ga. 224, above cited, is followed:

Stuart vs. Laird, 1 Cranch 299, h. n. 3, page 309.

U. S. vs. Philbrick, 120 U. S. 52, 59.

U. S. vs. Alabama, G. S. R. R. Co., 142 U. S. 615, 621.

U. S. vs. Johnson, 124 U. S. 253.

Roberts vs. Downing, 127 U. S. 607, 613.

U. S. vs. Hermonos, 209 U. S. 337, 339.

Johnson vs. Towsley, 13 Wall. 72.

In U. S. S. vs. Des Moines Navigation Co., 142 U. S. 510, in which a grant by the United States was attacked, the court in the last headnote said:

"The knowledge and good faith of the legislature are not open to question, but the presumption is conclusive that it acted with full knowledge and in good faith."

On page 545-546 the court stated the necessity of imputing to the legislature knowledge of conditions then existing and the undesirability of courts probing into matters and conditions then existing.

In *Winter vs. Jones*, 10 Ga. 190, this court said on page 206:

"(16) It is true that every presumption is in favor of a grant. That every prerequisite has been performed, is an inference properly deducible from the fact that it is the act of the highest officer of the State, and performed in the execution of a function prescribed by law, and requiring the exercise of judgment and discretion. It would, therefore, be extremely unreasonable, to void a grant in any court for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of a title from its commencement to its consummation in a grant."

Of like import is *Tameling vs. U. S. Co.*, 93 U. S. 644; *Maxwell Land Grant Case*, 121 U. S. 325, 369, 374, 379, 397.

In *Owensboro vs. Cumberland Tel. Co.*, 230 U. S. 58, the court said on pages 65-66:

"The grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for

the necessary conduct of a public telephone business, is a grant of a property right in perpetuity, unless limited in duration by the grant itself or as a consequence of some limitation imposed by the general law of the State, or by the corporate powers of the city making the grant. \* \* If there be authority to make the grant and it contains no limitation or qualification as to duration, the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the public and permanent character of the business such companies conduct and the large investment which is generally contemplated. If the grant be accepted and the contemplated expenditure made, the right cannot be destroyed by legislative enactment or city ordinance based upon legislative power, without violating the prohibitions placed in the Constitution for the protection of property rights."

In *Essex vs. New England Telegraph Co.*, 239 U. S. 321-2, the Court, speaking of the telegraph lines and easements, said:

"With full knowledge of all circumstances, the town authorities permitted the location and construction of lines along the highways, and for more than twenty years acquiesced in their maintenance and operation. The company has expended large sums of money and



perfected a great instrumentality of interstate and foreign commerce, in the continued operation of which both the general public and the Government have an important interest. Under similar circumstances it has been determined, upon broad principles of equity, that an owner of land, occupied by a railroad without his previous consent, will be regarded as having acquiesced therein and be estopped from maintaining either trespass or ejectment \* \* ; and like reasons may demand similar protection to the possession of a telegraph company. A municipal corporation, under exceptional circumstances, may be held to have waived its rights or to have estopped itself. \* \*

“The streets and highways of Essex are undoubtedly post roads within the meaning of the Act of 1866. \* \* What rights,—if any,—in respect to them were immediately secured by the telegraph company through acceptance of that Act, we need not consider. It entered upon those now occupied notoriously, peacefully and without objection and has developed there a necessary means of communication. The statute must be construed and applied in recognition of existing conditions and with a view to effectuate the purposes for which it was enacted. Among the latter, \* \* are the extension and protection of instrumentalities essential to commercial intercourse and the efficient conduct of governmental affairs. In the

circumstances, appellee has acquired the same Federal right to maintain and operate its poles and wires along the ways in question that would have attached had the selectmen granted a formal antecedent permit. Commercial transactions and the orderly conduct of governmental business have come to depend on the daily use of these lines and certainly would be as seriously hindered by their severance as if they had been constructed after an official location. There is no suggestion that ordinary travel is being interfered with; and, having long acquiesced in appellee's peaceful possession, the town may not now rely upon the claim that this was obtained without compliance with prescribed regulations and treat the company as a naked trespasser. Its rights under the Federal law would be violated by the threatened arbitrary interference."

**Title of Garst & Bean and of Augusta, Atlanta  
& Nashville Magnetic Telegraph Company to  
easements transmitted to Western Union  
Telegraph Co.**

There can be no question that any easements acquired under the Garst & Bean contract of 1850 and under the Act of 1852 incorporating the A. A. & N. M. T. Co. have been transmitted to, and are now possessed by, the Western Union Telegraph Company.

Justice Custer and the two Justices concurring with him so find. (Record, pg. 536):

"Defendant showed a right to the easement contested, by grant; that is, under the contract between Mitchell and Garst & Bean, as affirmed and ratified by the General Assembly. \* \* The transmission of this title through successive conveyances to this defendant could be shown in a way indicated in defendant's answer; \* \* and \* \* in view of those facts and circumstances pleaded, as well as the documents introduced, \* \* the jury would have been authorized to find against the State. \* \* If in any case a grant should be presumed, it should be presumed in favor of this defendant under the facts alleged and proved in this record." See full quotation, pg. 9 above.

This accords with the decisions upon this point, and particularly *Fletcher v. Fuller*, 120 U. S. 534, 544; *Wilson v. Snow*, 228 U. S. 217, *United States v. Chaves*, 159 U. S. 452, 464, and *United States v. Devereux*, 90 Fed. Rep. 182 (4 C. C. A.), 187-8.

#### **Acceptance of charter of A. A. & N. M. T. Co.**

It has been claimed that the grant under the Act of 1852 incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company is invalid because the acceptance of that charter has not been shown.

It is true that there is no corporate action proven accepting the charter, but in *Atlanta vs.*

Gate City G. L. Co., 71 Ga. 106, it was held in h. n. l, "if a charter is granted after having been applied for, acceptance may be presumed from such previous application." See also body of decision, pg. 117.

That decision related to a legislative charter, pg. 108, like the charter granted by the Act of 1852.

Acceptance is also to be presumed from the mortgages made by A. A. & N. M. T. Co. (Exhibits 15, 16, 17, record, pgs. 139-144); from the execution issued against the A. A. & N. M. T. Co. by Georgia courts, the levy by the Sheriff of Richmond County, Ga., on property of the A. A. & N. M. T. Co., his advertisement of sale (record, pg. 408), and the deeds of Georgia's Sheriffs so reciting and conveying property of that Company (Exhibit 18, 19, record, pg. 145, 146); from the record of the suits of Mills and of Coffin against the A. A. & N. M. T. Co. (Ex. Q, Q 2 and R, record, pg. 466, 473, 474), in each of which there was an appearance by the A. A. & N. M. T. Co., as defendant; in the former verdict and judgment was rendered against the A. A. & N. M. T. Co. These suits were brought in Fulton Superior Court in 1856 and in 1860. The first suit was by Mills, the former general agent and president of the A. A. & N. M. T. Co., for money advanced to the A. A. & N. M. T. Co. and for his salary for services performed, alleging that Mills was appointed general agent pursuant to the corporation's charter. The

last suit is for damages for failure of the A. A. & N. M. T. Co. to transmit messages in 1858 over its lines.

All of these documents, though excluded, were fully proved. This is shown by the recitals of the motion for new trial, paragraphs 36-41, record, pgs. 404-405; paragraph 49, record, pg. 407. The court has certified that the recitals in the motion for new trial are true. (Record, pg. 514.)

The acceptance of the charter is also to be presumed from recitals in the original deed from Hammett of 1858 and then recorded in the County records of five Georgia Counties conveying "the telegraph line from the City of Atlanta \* \* to the line dividing the said State of Georgia from the State of Tennessee \* \* situated and located immediately along the line of the Western & Atlantic Railroad, a distance of 120 miles more or less \* \* known as the Augusta, Atlanta & Nashville Telegraph Company line," (Ex. 3, record, pg. 110, 286; Ex. J., record, pg. 455); from similar language in another deed of 1859 from Wyly then recorded in Hamilton County, Tenn., conveying the same telegraph line from the Tennessee line to Chattanooga (Ex. 4, record, pg. 111; Ex. 5, record, pg. 456); and from a deed containing similar language conveying the entire telegraph line of the A. A. & N. M. T. Co., from Atlanta to Chattanooga to the American Telegraph Co. (Ex. 5, record, pg. 112). To the same effect is the language in Exhibit 2, record, pg.

109. These deeds (Exhibits 2 to 5 inclusive) each bear date A. D. 1858 or 1859. All were proved by the testimony of Atkins and of Burleigh, custodians of the records of the Western Union Telegraph Company, produced on the trial (record, pgs. 283, 408).

The American Telegraph Co. on July 12, 1866, conveyed all of its telegraph lines to the Western Union (record, pg. 460-466).

That each of these documents, though excluded as evidence, was fully proved is shown by statements in the motion for new trial, paragraphs 42-45, record, pg. 405-406; certified to be true (record, pg. 514).

From these facts the law presumes acceptance of the charter and corporate existence. 14 C. J., pgs. 172-173.

Besides this Stephens and Terrell proved the existence of this line in 1858 and in 1859 (record, pgs. 290, 291).

The presumption is that these lines of telegraph originally established about 1850 have never been abandoned. The burden to prove abandonment is on the plaintiffs, and they must make this proof by clear, unequivocal and convincing testimony.

A. B. & A. Ry. Co. vs. Coffee County, 152 Ga. 432, 436.

Gaston vs. Gainsville Ry. Co., 120 Ga. 516.  
pg. 518, par. 2.

Brunswick R. R. vs. Waycross, 91 Ga.  
573, 575.

Mere proof of possession in the Western Union Telegraph Company raises the presumption that it in some way acquired valid title to that which it occupies.

(c)

#### Contract of 1870.

The contract of 1870 made by Foster Blodgett, superintendent of the Western & Atlantic Railroad, and by Rufus B. Bulloch, Governor of Georgia, is fully set out in the record, pgs. 116-119. The preamble recites "That in order to provide necessary telegraph facilities for the party of the second part, (W. & A. R. R.), and to a better understanding of the terms on which the party of the first part, (W. U. T. Co.), shall occupy the line of railroad of the party of the second part with the line or lines of telegraph wires belonging to the party of the first part, and to permanently settle and define the business relations between the respective parties hereto, it is mutually contracted and agreed in consideration of the respective obligations herein assumed as follows, to wit:" \* \*

Then follows a statement of what the Western Union Telegraph Company covenants to do; followed by covenants of the State of Georgia includ-

7

7



ing the following: "Western Union Telegraph Company shall have perpetual right of way, to erect and maintain Telegraph lines along said Railroad, of as many wires as it may deem necessary to its business, and additional lines of poles, whenever the said party of the first part shall so elect."

In the first paragraph of the agreement naming the parties the Western & Atlantic Railroad is erroneously referred to as Western & Atlantic Railroad Company, a corporation. The agreement is signed "The Western & Atlantic Railroad, by Foster Blodgett, Approved Rufus B. Bulloch, Governor." The resolution of the General Assembly of Georgia of October 22, 1887, copied in the record pg. 502, recognizes that this contract was made by Foster Blodgett, as superintendent of the Western & Atlantic Railroad. Thereby the General Assembly of Georgia recognized that the agreement was in fact made by the State of Georgia, which shows that the language in its first paragraph, "Western & Atlantic Railroad Company, a corporation," was a clerical error, and that the State of Georgia was the party of the second part to that agreement.

This contract was plead in defense by the defendant in its original answer (record, pg. 82, par. 10), and attached as an exhibit thereto (record, pg. 116). This was stricken from the answer on plaintiff's motion (record, pg. 128, par. 28, ruling page

131). It was plead in the amendment to the answer (record, pg. 151, par. 11; and in exhibit 22, record, pg. 128, par. 15). This exhibit 22 is referred to in several different pleas as a part thereof (record, pg. 153, 155, 158, 160, 161, and specifically on pg. 161, 162, 163, 166 and 171).

On plaintiff's motion this contract set up in defense in the amendment to defendant's answer was stricken.

The court refused to permit this contract of 1870 to be introduced in evidence as shown by motion for new trial (record, pg. 419, par. 59). In its original answer defendant claimed that the Georgia Statute of November 30, 1915, and its amendment of August 4, 1916, the lease of 1917, the action of the Western & Atlantic Railroad Commission, and any decree of this court granting the relief sought by the plaintiffs thereunder, would impair the obligations of the contract of 1870, and would thereby violate the Constitution of the United States. (record, pg. 107). This defense was stricken on plaintiffs' motion (record, pg. 130, par. 39, 40, 41, ruling record, pg. 131). The same defense was set up in paragraph XXV of the amendment to defendant's answer (record, pg. 169). It was stricken on plaintiffs' motion (record, pg. 194, par. 59, ruling record, pg. 195).

The contract of August 18, 1870, is not discussed in either of the opinions of the Justices of the Supreme Court of Georgia.

### **Contract of 1870 Authorized.**

The Georgia Act of January 15, 1852, printed in the record, pgs. 211, 212, authorized the execution of this contract by the Superintendent of the Western & Atlantic Railroad with the approval of the Governor. That Act authorized the Superintendent to "contract for and purchase machinery, cars, materials, workshops and all other things necessary and proper for the construction, repair and equipment of the road and of its general working and business, but all contracts and expenditures which exceed the sum of \$5,000.00 shall be subject to the approval of the Governor."

This Act also gave the Superintendent "power with the approval of the Governor, to settle all claims against the Western & Atlantic Railroad."

### **Contract of 1870 Beneficial to Georgia.**

The contract of 1870, as its preamble shows, was "to provide necessary telegraph facilities \* \* and to a better understanding of the terms on which the party of the first part shall occupy the line of railroad \* \* and to permanently settle and define the business relations between the respective parties." (Record, pg. 116.) Presumably the Governor and Superintendent knew at that time of the Garst & Bean contract, and of the ratifying statute of 1852. Presumably they knew that the Western Union Telegraph Company claimed to have succeeded to the title of the easements under the contract of 1850 and the Statute of 1852 upon its

purchase from the American Telegraph Co. July 12, 1866. Doubtless there was confusion due to the state of affairs existing during the Civil War, and the loss of records by fire shown in the record in this case.

It should also be borne in mind that when the contract of August 18, 1870, was made, the State of Georgia was doubtless negotiating for the first lease of its railroad. That lease signed by Governor Bulloch, December 27, 1870, was executed pursuant to a Georgia Statute of October 25, 1870 (record, pgs. 75, 219). The same Governor who signed this lease, approved the contract of August 18, 1870, with the Western Union Telegraph Company.

It is a fair inference that the railroad could then have been leased by Georgia on more advantageous terms and for a better rental after the contract of August 18, 1870, had been executed, than it could have been leased if such agreement had not been made.

The testimony of MacDonald, Chief Engineer of the N. C. & St. L. Ry. and a witness for the plaintiffs, shows that it was essential to the safe and efficient operation of the railroad that it have the benefit of telegraphic facilities. MacDonald testified (record, pg. 235): "In the year 1870 I should regard a telegraph line along the right of way of a railroad as being indispensable to the suc-

cessful and expeditious handling of trains. It became an absolute necessity as soon as the telegraph was invented and found practicable so far as I know."

The effect of the decision of the Supreme Court of Georgia in *A. C. L. Ry. Co. vs. Postal Tel. Co.*, 120 Ga. 269, is that the establishment of a line of telegraph along a railroad and on its right of way is not detrimental to railroad use of its right of way and does not interfere therewith. In *S. F. & W. R. Co. vs. Postal Tel. Co.*, 115 Ga. 560, the Supreme Court of Georgia held that the legislature of that State has "declared that it was necessary for the public good that telegraph companies should not be compelled to seek a route for the erection of its telegraph lines other than through and upon the right of way of a railroad company."

### SUMMARY

1. The first contract relied on (*Garst and Bean*), and the second contract relied on (*The Augusta, Atlanta and Nashville Telegraph Company's charter*) are valid contracts, protected by the Federal Constitution, if sections six and nine of the act of 1852 were validly enacted according to the Georgia constitution and laws. We have sought to show that they were. Notwithstanding the decision of a divided court upholding the decree in this particular case between these particu-

lar parties, any other court sitting in Georgia, in any future case, will be obliged by the Georgia constitution, laws and rules of practice to recognize and enforce, with respect to this question, the prior decisions of a unanimous State supreme court as distinguished from the present decision of a court divided three to three. This contention, if sound, as we believe it to be, ends the case, for it means that valid contracts for a perpetual right of way exist, and if they exist they have been impaired.

2. In any event this court is not precluded, in a case involving the claim that a contract has been impaired, from considering and determining for itself, regardless of the conclusions reached by the State courts, whether such enactments, **taken in connection with the other circumstances of the case**, do not create such contractual rights as will be protected by article 1, section 10 of the Federal Constitution. And when they have been recognized as valid enactments for a long term of years by the State authorities, legislative, executive and judicial; when they have been relied on in good faith by the other party, by the investment of large amounts of capital and the continuous performance of service for a long period of years, and when the State has, without objection or repudiation of the statute, continued for a long term of years to receive benefits from such

other party, which benefits could not and would not have been received had it not been for the statute, and which have not been and cannot be returned, the existence of a contract will be recognized by this court without regard to the technical validity of the statutory enactment as such.

3. The contract of 1870 was duly authorized by the State, and is binding on it. The validity of this agreement was challenged by the State's lessee in 1875, and this court said (*Western Union v. Western and Atlantic Railroad Co.*, 91 U. S. 283, 290: 1875) that it was not then necessary to decide the question, but that "so long as this company," (the lessee) "by the use of the wire and the apparatus, gets the benefit of the contract, it must also abide by the terms in other respects." Not only had the State, which was not a party to that suit, received substantial benefit from the contract by reason of its ability on account of the contract to negotiate an advantageous lease, but the State or its lessees have continued to accept the benefit of the contract. Whatever position they might have been able to take with respect to its validity in 1875, it is respectfully urged that with the passing of the ages a point of time must necessarily be reached when this court will feel obliged to say that the contention that the contract is invalid comes too late. The contract of 1870 was



made fifty-four years ago. We earnestly urge that the point of time has been reached.

Respectfully submitted,

JOHN G. MILBURN  
(of New York, N. Y.)

FRANCIS R. STARK  
(of New York, N. Y.)

ARTHUR HEYMAN  
(of Atlanta, Ga.)

WILLIAM L. CLAY  
(of Savannah, Ga.)  
Attorneys for Western  
Union Telegraph Co.

## APPENDIX.

## EXHIBIT A.

**Garst & Bean contract and report of Chief Engineer W. & A. R. R. (record pg. 138), introduced in evidence (record pg. 280).**

On the 10th October, 1850, Messrs. Garst & Bean proposed to organize a company of Stockholders and to build for them a Telegraph line from Atlanta to Nashville, which was subsequently made to embrace the Georgia Rail Road and to extend to Augusta, expressing a desire, at the same time of procuring the aid and countenance of the W. & A. R. R. of the State of Georgia. The Company is called the Augusta, Atlanta, and Nashville Telegraph Co. Mr. Garst retired and Mr. Bean prosecuted the enterprise alone. The following correspondence will explain the precise terms of the contract between the Road and Tel. Company.

Chief Engineer's Office, W. & A. R. R.

Atlanta, Oct. 11, 1850.

"Gentlemen:—I have given much reflection to the subject of your note of yesterday, and I have had full and free conversations with His Excellency Geo. W. Towns upon the subject, and we are fully satisfied, not only from the nature of the telegraph, but from the experience of other Roads, that there is no appendage more valuable in the efficient management of a rail road than a tele-

## APPENDIX.

**graph line**, and we have come to the conclusion to submit to you this proposition.

"1. To furnish and erect the posts from Atlanta to Chattanooga, which shall be 24 feet long with four inches in diameter at the little end, and be planted four feet in the ground.

"2. To grant you the use of our right of way for the Telegraph Company, and to pass your officers and materials along the road free of charge.

"3. For and in consideration of the foregoing, the W. & A. R. R. is to receive the sum of five thousand dollars to be placed to its credit upon the Books of the Telegraph Company, and instead of interest on that sum, it is to receive dividends as they may be declared from time to time, and to be represented in the meetings of the company to that amount by the Chief Engineer, or such other person as may be appointed to represent the same. +

"4. And in further consideration of the foregoing services and grant, all the telegraph offices between Atlanta and Nashville erected by the Company shall be subject to the use of said road free of charge, and said company shall erect as many offices as the road may require in addition to the regular offices of the Company, but the latter shall be at the expense of the road.

Yours respectfully,

WM. L. MITCHELL

Chief Engineer.

## APPENDIX.

“Mr. David W. Garst &  
Mr. James M. Bean,  
Atlanta, Ga.

Atlanta, Oct. 11, 1850.

“Sir:—We hereby accept the proposition submitted in yours of this date. ,

Yours respectfully,

D. W. GARST

J. M. BEAN.

“W. L. Mitchell, Esq.  
Chief Engineer, &c,  
Atlanta, Geo.

“Whereupon I passed an order, that so soon as the Telegraph Company is sufficiently organized to warrant the undertaking, the Resident Engineer and Road Master make all the necessary arrangements for carrying out our part of the foregoing contract; but we did not commence planting the posts till last May, and from a desire to economise as much as possible and do the work with our repairing parties so as not to interrupt their regular duties, the work has progressed slowly, but all the posts have been delivered and half or more are planted, and the wire stretched beyond Kingston, and a branch line has been established from Kingston to Rome and an office placed there.

## APPENDIX.

"Our out-lay of money for this job has been but little beyond the cost of the posts, and they have been delivered at fifteen cents apiece. We expect the line to be in working order as far as Chattanooga in a month or two more, when we expect to be able to infuse additional efficiency in the management and render the anxiety felt for the tardy trains less painful."

**APPENDIX.****EXHIBIT B.****Material portions of contract by Georgia statute of January 27, 1852.**

"An Act to incorporate the Augusta, Atlanta and Nashville Magnetic Tel. Co."

"Sec. 1. Be it enacted by the senate and house of representatives of the State of Ga. in general assembly met, and it is hereby enacted by the authority of the same, that James M. Bean, John H. Glover and John P. King, and such persons as now are, or hereafter may be associated with them, including the subscribers in this State who have acquired from Samuel F. B. Morse, the right to construct and carry on the Electro Magnetic Telegraph, by him invented and patented through this State and other States, on the route leading from the city of Augusta, through Atlanta, to the City of Nashville, in the State of Tennessee, be and they are hereby made and declared a body politic and corporate in law, for the purpose of constructing, erecting and maintaining a line of the said telegraph, on the route aforesaid, or any other route through and within this State, and of transmitting intelligence by means thereof, by the name and style of the Augusta, Atlanta & Nashville Magnetic Telegraph Company.

"3. Sec. III. That the said corporation shall have power and authority to build or purchase any connecting or side line in this State, having ac-

## APPENDIX.

quired the right to do so from the owners of Morse's patent, and may enlarge its capital for that purpose.

**"6. Sec. VI. And be it further enacted, that the contract entered into on the eleventh day of October, 1850, by William L. Mitchell, chief engineer of the Western & Atlantic Railroad and D. W. Garst and J. M. Bean on the part of said company, be and the same is hereby ratified and affirmed, and that at every election, each share shall entitle its holder to one vote, and absent stockholders may vote by agent or proxy, on producing written authority so to do. And in case of an equal number of votes on both sides, the election shall be decided by lot, and the chief engineer of said railroad, or other officer having the chief control of said road for the time being, shall by himself, or his proxy duly authorized, cast the vote to which the State is entitled under said contract.**

**"8. Sec. VIII. That the said corporation shall have power and authority to contract with any person or persons or bodies corporate, for the purpose of connecting its lines of telegraph with lines out of the State.**

**"9. Sec. IX. That the Augusta, Atlanta and Nashville Magnetic Telegraph Company shall have power and authority to set up their fixtures along and across any high road or high roads; and any**



## APPENDIX.

railroad which now or may hereafter belong to this state, and any waters or water courses of this State, without the same being held or deemed a public nuisance, or subject to be abated by any private person: Provided, the said fixtures be so placed as not to interfere with the common use of such roads, waters, or water courses, or with the convenience of any land owner, further than is unavoidable.

"10. Sec. X. That the said corporation shall be bound, upon the application of any of the officers of this State, or of the United States, acting in the event of any war, insurrection, riot, or other civil commotion or resistance of public authority, or in the punishment or preventive of crime, or the arrest of persons charged or suspected thereof, to give to the communications of such officers immediate dispatch; and if any officer, clerk, or operator, of the said corporation shall refuse, or wilfully omit to transmit such communications, or shall designedly alter or falsify the same for any purpose whatsoever, he shall be subject, upon conviction thereof before any court of competent jurisdiction, to be fined and imprisoned according to the discretion of the court, and in proportion to the aggravation of the offence for transmitting such communications. The said corporation shall charge no higher price than shall be usually charged by it for private communications of the

## APPENDIX.

same length. And the said corporation shall be bound in like manner, at all times upon the application of any other person, not an officer of the State or the United States to give like immediate dispatch to each and every communication. And should any officer, clerk or operator, of the said corporation, willfully omit to transmit such communications, or shall alter or falsify the same, he shall be deemed guilty, and punished in like manner as is provided in the foregoing part of this section relative to the communications of public officers.

"12. Sec. XII. That the service of process of any court of this State, shall be legal and valid on said body politic and corporate, if the same shall be left at the office of the company within any district of this State: Provided, the president of the company is absent from, and beyond the limits of the said district, and that this act shall be deemed a public act."

## EXHIBIT C.

## APPENDIX.

*Go to Cincinnati. 114*  
*248/26*

**Contract of 1870 between Georgia and the  
W. U. T. Co. (record pg. 116).**

**"Articles of Agreement made and entered into by and between The Western Union Telegraph Company, a corporation under the laws of the State of New York, as party of the first part, and The Western and Atlantic Railroad Company,<sup>†</sup> a corporation under the laws of the State of Georgia, as party of the second part, Witnesseth:**

**"That in order to provide telegraph facilities for the party of the second part, and to a better understanding of the terms of which the party of the first part shall occupy the line of Railroad of the party of the second part with the line or lines of telegraph wires belonging to the party of the first part, and to permanently settle and define the business relations between the respective parties hereto, it is mutually contracted and agreed in consideration of the respective obligations herein assumed as follows. to wit:**

**"The party of the first part agrees:**

**"First: To set apart on its line of poles along said Railroad a telegraph wire for the exclusive use of said party of the second part.**

<sup>†</sup> See foot note, pg. 99.

**APPENDIX.**

"Second: To equip said line of wire with as many instruments batteries and other necessary fixtures as said party of the second part may require for use in its Railroad Stations and to put the same in complete working order.

"Third: To run said wire into all the offices of said party of the first part along the line of said Railroad.

"Fourth: To have said wire set apart for exclusive use of said Railroad Company in the transmission of messages on the business of said railroad on and along the line thereof, and all such messages originating at any point on said road, whether sent from, or received at the stations of said party of the second part, or the stations of said party of the first part on said road, shall be transmitted and delivered free of charge.

"Fifth: When the wire set apart to said Railroad Company shall not be in working order, to transmit free of charge over other wires of said telegraph company, the messages of the Officers and agents of the party of the second part on the business of said Railroad Company between points on said road where said Telegraph Company may have stations giving precedence to messages relating to the movements of trains, over any commercial or paid messages so far as the Statutes of the State, or the United States, may allow such precedence.

## APPENDIX.

"Sixth. To furnish such principal Officers and Agents of the party of the second part, as may be designated by application in writing of the General Superintendent of said Railroad Company, with annual franks or passes, entitling them to send messages free, over all the lines of the party of the first part, Provided, however, that said party of the first part shall be entitled to charge up, and keep account of, all such messages transmitted to or from any point off the line of said road of the party of the second part, at its usual rates for the transmission of commercial messages and for all of such account above the amount of Two Hundred dollars (\$200) in any one month, said party of the second part shall pay one half thereof, being half rates for all the business done over the lines of the said party of the first part, above the said sum of Two Hundred dollars (\$200) per month, or in any one month.

"And the party of the second part in consideration of, and agreeing to, all the foregoing, further covenants:

"First: That the party of the first part shall have **perpetual right of way**, to erect and maintain Telegraph lines along said Railroad, of as many wires as it may deem necessary to its business, and additional lines of poles, whenever the said party of the first part shall so elect, and the exclusive right of way so far as said party of the second part has the power to grant or secure the

**APPENDIX.**

same, and said party of the second part, if it has the right and power to refuse, will not transport poles, wires or other material for any other Telegraph Company, at less than full rates for freight thereon, nor distribute or unload the same at other than the regular Railroad Stations on said road; and should a competing line of telegraph be established along said Railroad, then the party of the first part shall be released from its stipulation to transmit, free of charge, any business of said Railroad Company off or beyond its line of road.

“Second: To transport for said party of the first part, free of charge, all poles, wire and other material required by said party of the first part for the construction, repairs, or maintenance and operation of its lines, and distribute at the places required, such poles, wire and other heavy material as may be needed, along the line of said Railroad, either in the construction of additional lines, or in the repair of the same and of existing lines.

“Third: To transport in any of its passenger trains, the officers and agents of the party of the first part, and put them off at any station of said road, or at any discovered break of the telegraph wires, such officers or agents presenting franks or passes, which shall be supplied at any Ticket Office of said party of the second part, on the application of the Superintendent of the party of the first part.

**APPENDIX.**

“Fourth: To maintain all such telegraph stations as may be opened by, or for the use and benefit of, said Railroad Company, at the exclusive cost of the party of the second part; to appoint its own operators thereat; but to retain no operator who refuses, or persistently neglects, to obey the rules and regulations of said party of the first part.

“Fifth: To receive for transmission, and send over the wires and deliver to address at the Railroad Telegraph Offices in towns or at Stations where the party of the first part may have no offices all commercial or other messages paid or to be collected, that may be offered, under the rules of said party of the first part, and make monthly reports thereof, and pay over monthly to said party of the first part, all the tolls collected thereon, and to cause the operators and agents of said party of the second part to observe all the rules and regulations of the party of the first part, with respect to the monthly reports of business and payment of all receipts thereon; and the regular rates of tolls shall accrue to the party of the first part on any and all business received at, or transmitted from, the Telegraph Stations of the party of the second part, except the legitimate Railroad Messages of the said party of the second part.

“Sixth: To pay to said party of the first part the cost of constructing the wire herein designated and set apart to the exclusive use of said party



## APPENDIX.

of the second part, and the cost of equipping the same at the Railroad Stations not already supplied with instruments, batteries and other necessary fixtures, as soon as the cost thereof can be ascertained.

"In Witness Whereof, the parties hereto have by their proper Officers and under their corporate seals duly executed this Agreement this eighteenth day of August, 1870.

"THE WESTERN UNION TELEGRAPH  
COMPANY,

By Wilm. Orton, President.

Attest: GEORGE WALKER,  
Secty. pro Tem. (Seal)

"THE WESTERN ATLANTIC RAILROAD,  
By Foster Blodgett.

"Approved. Rufus B. Bullock, Governor.

"By the Governor. H. C. Corson, Secty. Ex.  
Dept. (Seal)."

† The recital in the first paragraph of this agreement that the party of the second part is a corporation is an evident mistake of the scrivener. The contract was made by Georgia as owner of W. & A. R. R. as is shown by the signatures of the agreement and is so recognized by the General Assembly of Georgia in its resolution of 1887 (record pg. 502).

## APPENDIX.

## EXHIBIT D.

**Material portions of Georgia Statute of November 30, 1915 (record pg. 220-222).**

"An Act to provide for the leasing or other disposition of the Western and Atlantic Railroad, and its properties for the creation of the commission to effectuate such purpose, and to define its powers and duties; making an appropriation for the cost of the work required, and for other purposes.

"Sec. 1. There is hereby created a commission to be known as the Western and Atlantic Railroad Commission, which shall be composed of the Governor of the State, the Chairman of the Railroad Commission, G. Gunby Jordan, Judson L. Hand, and Fuller E. Callaway, W. A. Wimbish is hereby named as attorney and counsel for the Commission, and his salary shall be fixed by the Commission.

"Sec. 2. The Commission is hereby charged with the duty and is vested with full power and authority, except as herein provided, to ascertain, consider and determine the terms and conditions upon which the Western and Atlantic Railroad shall be leased, to become effective on the expiration of the present outstanding lease, to wit: Dec. 27, 1919.

**APPENDIX.**

"Sec. 3. The Commission shall, among other things, consider and determine, subject to the provisions of this act, the following:

"7. What, if any, property is owned by the Western and Atlantic Railroad not useful for railroad purposes, that could be properly and advantageously disposed of separately from the lease of the road.

"8. What, if any, steps should be taken to assert the right of title of the State to any part of the right of way or properties of the road that may be adversely used and occupied.

"Sec. 5. Among the duties to be required of the Commission shall be included the following: It shall cause to be prepared, if not otherwise obtainable, complete and accurate surveys, maps, profiles and estimates, showing—

"2. The extent and character of every use or occupation of the right of way, tracks and other properties of the road by any person or corporation other than the lessee, and the authority therefor.

"3. The properties not used or apparently not useful for railroad purposes, with an estimate of the market value of such properties, and the use to which they might be applied.

"Sec. 6. Be it further enacted, that the Commission, in pursuance of a resolution to be adopted

## APPENDIX.

by a majority of the members thereof in regular meeting assembled, is hereby fully authorized and empowered to lease and contract for the leasing of the railroad properties known as the Western and Atlantic Railroad, including the terminals, thereof, and its property other than its railroad property, not connected with either of its terminals; and the same may be leased either in its entirety or as a part, whether surface, underground or overhead rights; and the Commission shall recommend and report to the General Assembly what disposition shall be made of the part of the property which the Commission concludes cannot be advantageously leased.

"Sec. 6A. The said Commission shall also include in said report a full and complete inventory of all personal property, rolling stock, equipment, supplies, tools, etc., to be included in the lease, as received from the present lessee, together with a statement of condition and estimated value.

"Sec. 8. The Commission is hereby further instructed and directed to prepare, so that the same may be presented to the General Assembly with the report of the Commission, bills carrying into effect any recommendation which the Commission may make \* \* with respect to what steps should be taken to assert the right and title of the State to any part of the right of way of any part of the road that may be adversely used or occupied; and with respect to any other recommenda-

## APPENDIX.

tions which, in its opinion, and which may require legislation by the General Assembly of Georgia to fully, completely and adequately protect all the interest of the State of Georgia, in regard to said road and all of its parts and properties, whether reckoned as surface, overhead or underground rights.

"Sec. 11. The persons, association or corporation accepted as lessees under this act, if not already a corporation created under the laws of Georgia, shall from the time of such lease being entered on the executive minutes, and until after the final adjustment of all matters springing out of said lease contract, become a body politic and corporate under the laws of this State, under the name and style of the Western & Atlantic Railroad, which body corporate shall be operated only from the time of their taking possession of said road as lessees and it shall have the power to sue and be sued on all contracts made or to be performed, and all torts committed by said company, in like manner and time and place as other railroad companies operating railroads in this State may sue and be sued, after the execution of said lease or for any cause of action which may accrue to said company or to which it may become liable.

" \* \* The Principal office and place of business of said company shall be in this State; provided that nothing in this act shall be construed as an

**APPENDIX.**

amendment of the charter of any corporation which may lease said road.

“Sec. 12. The principal office of the Western & Atlantic Railroad shall be within the limits of the State of Georgia.

“Sec. 17. The lessee or lease company hereunder shall be subject to, and required to observe and obey, all just and reasonable rules, orders, schedules of freight and passenger tariffs as may be prescribed by the laws of this State, or the Railroad Commission of Georgia in like manner and to the same extent as other railroads in this State.”

**EXHIBIT E.****APPENDIX.**

**Material portions of the Georgia statute of August 4, 1916, (record pgs. 230-231).**

"An Act to amend an act approved November 30, 1915, providing for the leasing or other disposition of the Western & Atlantic Railroad and its properties, and for the creation of a Commission to effectuate such purpose, and for other purposes, by adding thereto other provisions further defining the powers and duties of the said commission; and for other purposes.

"Section 5-A. The said Commission, subject to direction in specific cases by the General Assembly, is hereby given full power and authority in its discretion to deal with and dispose of any and all encroachments upon, and uses and occupancies of any part of the right of way and properties of the Western and Atlantic Railroad by any person other than the present lessee, and its tenants and licensees under and during the term of the present lease, whether such encroachments, use or occupancy be permissive or adverse, and whether with or without claim of right therefor. The said Commission is hereby fully authorized and empowered to determine whether they, or any of them shall be moved and discontinued, or whether they, or any of them shall be permitted to remain, and, if so, to what extent and upon what terms and condi-



## APPENDIX.

tions. The said Commission is further authorized to adjust, settle, and finally dispose of any and all controversies that may exist or that may arise with respect to any adverse use or occupancy of any part of said right of way and properties of the Western & Atlantic Railroad, in such manner and upon such terms and conditions as it may deem the best interests of the State require; and all contracts and agreements that said commission may make or enter into in settlement or disposition of all matters touching such adverse uses and occupancies shall be binding upon the State. The said Commission is further authorized and fully empowered to take such action as it may deem proper and expedient to cause the removal and discontinuance of any encroachment, use or occupancy of said right of way and properties which in its opinion should be removed or discontinued, and to this end the Commission is authorized and empowered to institute and prosecute, in the name and behalf of the State of Georgia, such suits and other legal proceedings as it may deem appropriate in protection of the States' interest, or the assertion of the State's title."

## APPENDIX.

## EXHIBIT F.

**Resolution of W. & A. R. R. Commission** (record pgs. 39-40), introduced in evidence (record pgs. 231-232).

"Whereas, the Nashville, Chattanooga & St. Louis Railway, as Lessee of the Western & Atlantic Railroad, under the lease beginning December 27th, 1919, has represented to this Commission that the Western Union Telegraph Company is adversely using and occupying the right of way of said railroad by telegraph lines, poles, wires and other appurtenances without authority therefor from the State of Georgia, and against the consent of the Nashville, Chattanooga & St. Louis Railway. x

"And Whereas, the said Nashville, Chattanooga & St. Louis Railway has requested this Commission to take appropriate action for the removal of this encroachment and the discontinuance of this adverse use in pursuance of the Act creating this Commission as amended August 4, 1916, and of Paragraph 14 of the new lease contract:

"And Whereas, the Counsel for this Commission has reported that the adverse use and occupancy of said right of way by the Western Union

## APPENDIX.

Telegraph Company is without lawful authority from the State of Georgia; and that the institution of appropriate proceedings for the removal of said encroachment and the discontinuance of said use is within the purview of said Act of August 4th, 1916, and within the contemplation of Paragraph 14 of the new lease contract dated May 11th, 1917.

+ "Now Therefore, be it resolved, That William A. Wimbish, Counsel for this Commission, be, and he is hereby, authorized and directed to institute and prosecute, in the name and behalf of the State of Georgia, such suits and legal proceedings as may be appropriate for the removal of said encroachment and the discontinuance of said use:  
X Provided, the Nashville, Chattanooga & St. Louis Railway, as such lessee, shall join in such suits and proceedings and defray the proper costs and expenses thereof without liability over against the State."



FILED  
OCT 7 1925

WM. R. STANSBURY  
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1925.

WESTERN UNION TELEGRAPH COMPANY

*Plaintiff in Error and Petitioner  
for Writ of Certiorari*

*vs.*

STATE OF GEORGIA, as Owner of WESTERN &  
ATLANTIC RAILROAD

*and*

NASHVILLE, CHATTANOOGA & ST. LOUIS RAIL-  
WAY

As Lessees operating said Railroad under the corporate  
name and style of Western & Atlantic Railroad

*Defendants in Error, and  
Respondents to Petition for Writ  
of Certiorari*

No. 24.

## REPLY BRIEF FOR WESTERN UNION TELE- GRAPH COMPANY

PLAINTIFF IN ERROR

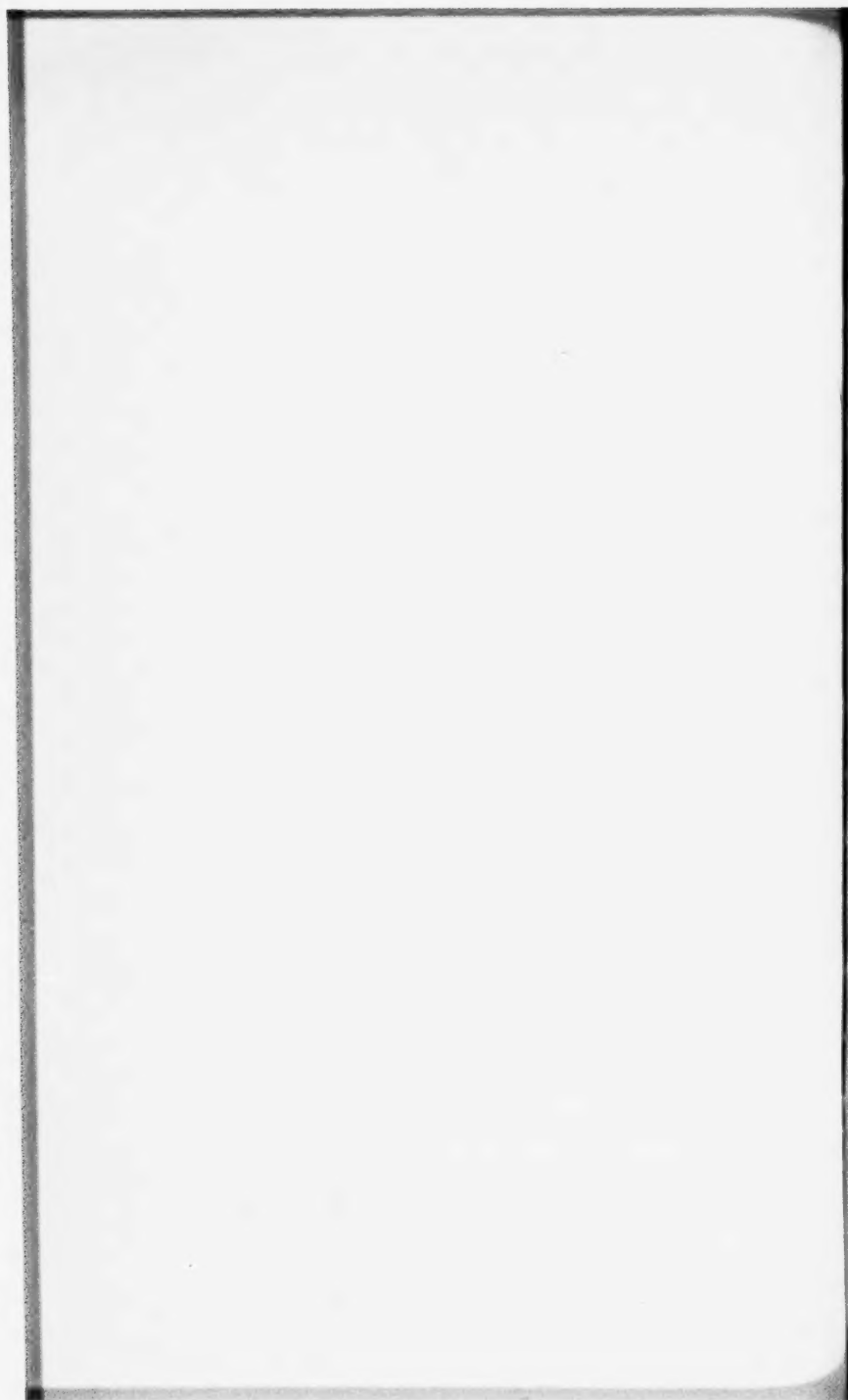
JOHN G. MILBURN  
(of New York, N. Y.)

ARTHUR HEYMAN  
(of Atlanta, Ga.)

Attorneys for Western Union Telegraph Co.

FRANCIS R. STARK  
(of New York, N. Y.)

WILLIAM L. CLAY  
(of Savannah, Ga.)



In The  
Supreme Court of the United States

OCTOBER TERM, 1925.

WESTERN UNION TELEGRAPH COM-  
PANY,  
Plaintiff in Error and Petitioner  
for Writ of Certiorari.

*vs.*

STATE OF GEORGIA, as owner of  
WESTERN & ATLANTIC RAILROAD,

*and*

NASHVILLE, CHATTANOOGA & ST.  
LOUIS RAILWAY,

As Lessees operating said railroad  
under the corporate name and  
style of WESTERN & ATLANTIC  
RAILROAD,

Defendants in Error, and Re-  
spondents to Petition for Writ  
of Certiorari.

No. 24.

**REPLY BRIEF FOR WESTERN  
UNION TELEGRAPH COMPANY,  
PLAINTIFF IN ERROR.**

**I.**

**Jurisdiction.**

It was our understanding that counsel for



defendant in error did not dispute the existence of jurisdiction. In view, however, of the argument on this point in their brief, and particularly of the attempt made to distinguish this case from *Columbia Railway, Gas & Electric Company v. South Carolina*, 261 U. S. 236, a short reply on this point may be appropriate. We refer particularly to the argument on pages forty and forty-one, to the effect that the Georgia acts of 1915 and 1916 at least allowed to the Western Union its "day in court", and that an act which allows a day in court cannot impair the obligation of a contract; and to the argument on page fifty-six, in which the Columbia Railway case is discussed and an attempt made to distinguish it.

We do not understand that the defendants in error challenge the authority of the Columbia Railway case, or that they are asking this court to overrule it. Starting, therefore, with the assumption that that case is conceded to be controlling on similar facts, we hope to dispel any possible doubt as to jurisdiction by showing (1) that the case at bar has every element essential to jurisdiction which was present in the Columbia Railway case, and (2) that in the case at bar even greater effect was necessarily given to the statute by the courts below than in the Columbia Railway case.

## (1)

**Every jurisdictional element in the Columbia Railway case present in the case at bar.**

The Columbia Railway case originated in the common pleas circuit court of Richland county, South Carolina. It arose on demurrer to the complaint. The question was whether a clause in a contract was a covenant merely, or a condition subsequent, breach of which authorized a forfeiture. The trial court held on demurrer that it was a condition subsequent. The demurrer was overruled, and, the defendant refusing to plead further, the judgment was affirmed by the supreme court of the State. Both the opinion of the circuit court and that of the supreme court of the State are reported in 100 Southeastern Reporter at page 355. The only reference to the statute of 1917—the statute which was relied on in this court as impairing the obligation of a contract, and which this court held to have had that effect—in the opinion of the circuit court was the following:

“The legislative act of 1917, coupled with the alleged demand for possession and refusal, is equivalent to the exercise of the right of re-entry. (Citations.) A judicial proceeding was authorized by the act of 1917. (Citations.) The complaint shows no waiver by the State of any breach of conditions in the grant. The other specifications of demurrer were not pressed in argument. The purpose of this action is to determine

whether the alleged conditions existed in the grant, and whether the defendant and those under whom it claims have violated them. Both the conditions and violations are alleged. If the defendant has any defense, it must be shown by answer."

In the opinion of the supreme court of the State there was no reference to the act of 1917 except the following:

"The act of 1917 violates no constitutional right of defendant. *The legislature did not undertake to adjudicate anything, but merely declared that, in its opinion, a forfeiture had been incurred, and directed a judicial investigation and determination of the question in accordance with law.* The action is to enforce the obligations of the contract and not to impair them."

The judgment which this court reversed was the judgment of the supreme court of the State, and the construction placed by that court on the South Carolina act was undoubtedly recognized as controlling. If that is true, it seems idle to argue that a statute cannot impair a contract if it allows the complaining party a day in court. If the decision was influenced at all by the fact that the legislature had declared "that in its opinion a forfeiture had been incurred" we have the same situation in the case at bar, with the immaterial difference that here the declaration of opinion was not that of the legislature itself, but that of the administrative commission which the legislature had created and directed to inquire into the subject. If the remark of the circuit

court, that the legislative act, coupled with demand and refusal, was "equivalent to the exercise of the right of re-entry", was given any weight, we have the same situation here. In the most unfavorable view that can be taken of its rights, the Western Union was not a trespasser on the State railroad, but at worst a licensee under a revocable license. Before it could be ejected it was necessary for the State to take some action to revoke the license. The legislative act of 1916, coupled with the resolution of the Western & Atlantic Railroad Commission and the bringing of this suit, are precisely analogous in legal effect to the South Carolina act of 1917 and the bringing of the action in that case. In neither case was there any actual re-entry, or any other interference with the defendant's possession, but only the institution of a lawsuit by direction of the statute. Nor did the statute in the South Carolina case create any presumption, or shift any burden of proof. The question was one of law, as to the construction of a clause in a contract. The State courts distinctly declared that they were not bound by the legislative conclusion, but were examining the question of law for themselves. There was nothing that the defendant was required to do by the terms of the statute, in the way of submitting proof, which would have been unnecessary apart from the statute. There was nothing to be proved. It was simply the argument of a question of law.

## (2)

Greater effect was necessarily given to the statute in the case at bar than in the Columbia Railway case.

In the Columbia Railway case there had been a breach of condition for which the State was entitled to re-enter. So far as appears, an action might have been brought to enforce the forfeiture by the Attorney-General of the State, in the name of the State, in pursuance of his general authority to represent the State in its legal affairs, without the authority or mandate of any particular statute. Not so in the case at bar.

In the case at bar the act of 1916 withdrew from the Attorney-General the right to bring any action to eject the Western Union from the State-owned railroad, and conferred on the Western & Atlantic Railroad Commission exclusive power to deal with this entire subject. The commission was given power to determine whether or not the Western Union was there without right, and if it was there without right to compromise with the Western Union on such terms as it might see fit (see our principal brief, Appendix, p. 106), or to take steps to eject it. The petition alleges that "pursuant to the authority and direction of said act \* \* \* the said Western & Atlantic Railroad Commission \* \* \* adopted a resolution authorizing and directing the counsel for the commission, William A. Wimbish \* \* \* " to institute the present suit (record,

page 77); and that "in accordance with such authority and direction from the Western & Atlantic Railroad Commission this suit is brought" (*ibid*). The petition is signed, not by the Attorney-General of Georgia, but by William A. Wimbish. Had the Attorney-General of Georgia brought the suit, or had the suit been brought without a previous resolution of the Western & Atlantic Railroad Commission granting authority to bring it, it could not have been maintained as against the defendant's objection that by the acts of 1915 and 1916 the matter of investigating the Western Union's status, and removing it from the said railroad, if removal should be warranted, had been withdrawn from the jurisdiction of the Attorney-General and committed exclusively to the Western & Atlantic Railroad Commission. That the commission had found, as a result of its inquiry, that the Western Union was rightfully on the State railroad would have been a defense to the suit. So would it have been a defense if the commission had not yet completed its inquiry or passed its resolution. As a matter of fact, the defendant in its original answer raised the following issue as to the suit being brought by the authority of the commission:

"Defendant for lack of sufficient information is unable to admit or deny \* \* \* the allegation that this suit is brought in accordance with authority and direction from said commission. Defendant denies that said commission has such power and authority, \* \* \*" etc. (Record, page 106).

And plaintiffs moved to strike out the denial "that said commission has such power and authority", etc.,

"upon the grounds that under the act of November 30, 1915 and the amendment thereto of August 4, 1916, and the resolution of the Western & Atlantic Railroad Commission \* \* \* the power and authority of said commission \* \* \* do in law exist and are conferred by said acts of the general Assembly of Georgia and the lease contract made thereunder." (Record, page 130.)

And the plaintiff's motion was granted (record, page 131).

Whatever, therefore, may have been the Western Union's rights on the State-owned railroad, it is obvious that this particular action could not have been maintained, and this particular judgment could not have been rendered, without the acts of 1915 and 1916. If "some effect" was given to the South Carolina act in the Columbia Railway case, it is still more clear that effect was given to the Georgia acts in the case at bar.



## II.

### The Georgia Cases.

The Georgia decisions cited on pages 42 and 43 of our principal brief were not, it is true, decided prior to 1852, when the act on which we chiefly rely was passed. Those cases, however, did not make new law in Georgia. They merely declared what the law of Georgia had always been understood to be, and definitely determined that as it had been understood to be so it was and remained. Unless something to the contrary is shown, we do not have to go back of those cases in order to establish what the law of Georgia was in 1852.

For those cases are directly in point.

In the first three (*Goldsmith v. Rome Railroad*, *Davis v. Bank of Fulton*, and *Goldsmith v. A. & S. Railroad*) the titles of the acts involved did not contain the words "and for other purposes". Yet in the *Bank of Fulton* case (1860) "An act to incorporate the Bank of Fulton" contained a provision authorizing the joining in one action of all parties to a note or bill negotiated in the bank; in *Goldsmith v. A. & S. Railroad* (1879) "An act incorporating the Atlantic & Western Railroad" contained a provision that the railroad and its property should not be taxed beyond a specified amount on its annual income; in *Goldsmith v. Rome Railroad Company* (1879) "An act to incorporate

the M. Railroad & Steamboat Company" contained a provision that the company's stock should not be liable to any tax beyond a certain amount; and in each case the provision was sustained against the objection that it was matter different from the title.

Unless, therefore, the defendant in error has shown that there were decisions prior to 1852 which laid down a different rule, the law as of 1852 must be deemed to have been as announced in those decisions.

The earlier cases cited by defendant in error do not conflict with these authorities in the slightest degree.

Such earlier cases are three in number: *Mayor of Savannah v. State*, 4 Ga. 26 (1848); *Martin v. Broach*, 6 Ga. 21 (1849); and *Prothro v. Kendall*, 12 Ga. 36 (1852). In the *Broach* case the title of the questioned statute is not given, but at all events it was sustained as constitutional, the court remarking that the constitution "does not require that the title should contain a synopsis of the law, but that the act should contain no matter *variant* from the title". In *Mayor of Savannah v. State*, a statute provided for a commission to perform certain functions with regard to the waterfront "on the shore of Hutchinson's Island in the Savannah River, opposite the City of Savannah", and it was held constitutional, except as to a single section which purported to give the commissioners certain powers over the waterfront in an entirely different place; namely, on the south shore of the Savan-

nah River. In *Prothro v. Kendall*, two acts were considered. The first was entitled: "An act to authorize the clerks of the courts of ordinary, sheriffs, coroners and surveyors, to hold their office, during the intervention between the election and commissioning of their successors, and to regulate the transfer of papers and money"; and it was held that one section of the act, which purported to make it the duty of a newly elected officer to apply for his commission within twenty days, had "absolutely nothing" to do with the title, and was therefore void. The second was entitled: "An act to carry into effect the sixth section of the fourth article of the constitution", which provided that a collector or holder of public moneys should not be eligible to any State office until he should have accounted; and it was held that a provision of the act declaring that all officers who should fail to apply for their commissions within the time required by law should forfeit their offices and be ineligible to the vacancy had nothing to do with the title and was void. On the facts, there seems to be no question of the correctness of these decisions. We do not contend that the provision of the State constitution is entirely meaningless. It should of course be applied in a proper case; and these were proper cases.

We do however contend that a provision in an act incorporating a telegraph company, ratifying and approving a contract previously executed in the name of the State granting a right of way, and perhaps even more clearly a provi-

sion in such an act granting the company thereby incorporated a right of way in the future over State-owned railroads, are sufficiently germane to the subject-matter as expressed in the title to be valid under the rule laid down in the *Bank of Fulton*, *Rome Railroad* and *A. & S. Railroad* cases. As the court said in the *Bank of Fulton* case:

“Under the title ‘an act to incorporate the Bank of Fulton’ no grant or privilege or franchise, necessary or proper to a banking institution, is matter different from what is expressed in the title.”

There can be no grant or privilege more necessary or proper to a telegraph company than the grant of a right of way.

### III.

#### **The abortive condemnation proceeding.**

Some stress is laid by the defendants in error on the fact that, instead of relying from the outset on the contract rights now alleged to have been impaired, the plaintiff in error attempted to condemn a right of way over this railroad, which attempt for technical reasons failed. In the hurry of preparing a general campaign to protect its lines along the Louisville & Nashville Railroad and its controlled companies, it is not remarkable that counsel for the telegraph company did not first make a minute examination of the local situation as to title to land and easements in land over each foot of the system separately. Even had this been done, it might have been supposed at the beginning that condemnation was a speedier and more convenient way of clearing up any doubt as to the title than to await the outcome of such a litigation as this. Since neither ignorance of fact nor mistake of law on the part of its original counsel can estop the telegraph company with respect to a matter in which the State of Georgia has not been misled or injured by the telegraph company's conduct, further discussion of this feature of the case seems superfluous. The story of how and why condemnation was resorted to is fully explained in the testimony of the witnesses Heyman and Atkins (record, pages 196, 297, 299).

## IV.

**The rights of A. A. & N. M. Tel. Co.  
passed to the Western Union.**

The defendants in error attack the chain of title. In our principal brief, pages 10 to 13 and pages 72 to 77, we show why, for the purposes of this writ of error, it must be assumed that the chain of title is complete. The argument need not be repeated here. As a matter of history, it may be worth while pointing out that the exact facts with regard to the line, and the process by which it passed from the Augusta, Atlanta & Nashville Magnetic Telegraph Company into Hammett and from Hammett into Morris and others, the organizers of the American Telegraph Company, are set forth in full in the statement of facts in the case of *Kelly & Mitchell v. Morris*, 31 Ga. 54 (1860), a brief summary of which is attached as an appendix. It will be seen from the official report of this case that Hammett acquired the entire property of the company within the State of Georgia at sheriffs' sales "in several counties in Georgia, through which the telegraphic line passes, and in which the 'fixtures, furniture' etc. were found" (page 59); that the property "had been sold in Georgia by the sheriff, and purchased by Hammett, and had passed legally and peacefully into his possession" (page 61); that the defendants in that suit, Morris and others, were, by the plaintiffs' own showing, "in possession fairly and legally acquired" (*ibid*); and that this possession was held to be lawful.

The defendants in error say (pages 35 and 36 of their brief) :

“Those justices who were in favor of affirmance held :

\* \* \* \* \*

“The sale to Hammett did not convey anything but personality”.

The subquotation is not found in either opinion, or elsewhere in the printed record. We find for the first time, since the matter is called to our attention by the brief of the other side, that it is printed as the concluding paragraph of the syllabus in the report of this case in 156 Georgia 409, 410. This syllabus is prefaced “RUSSELL, C. J.”, indicating that it expresses the conclusions of the chief justice individually. It is followed by an opinion, also prefaced “RUSSELL, C. J.”; and this opinion ends with the statement “I am authorized to state that Mr. Justice Hill and Mr. Justice Gilbert concur in the views *herein* expressed”. The opinion itself makes no reference whatever to the sale to Hammett; and we doubt, therefore, whether counsel for the defendant in error are correct in stating that all three justices who were in favor of affirmance held that the sale to Hammett did not convey anything but personality. Even if they did, however, it does not affect the question for two reasons:

(1) It is an obvious inadvertence. The record shows two sales to Hammett: one under a sheriff's deed covering the property in Richmond



county (Augusta), printed at page 145; and the other under a sheriff's deed covering the property in DeKalb county (Decatur), printed at pages 146 and 147. While the former deed covers only personalty, the latter explicitly includes

"all the property pertaining and belonging to the said Augusta, Atlanta & Nashville Magnetic Telegraph line situated in the county of DeKalb, consisting of the post, wire and machinery and all the appurtenances right of way franchise Cia belonging thereto together with all and singular the rights members and appurtenances thereof, and also all the estate, right, title interest claim and demand of the said Augusta, Atlanta & Nashville Company in law equity or otherwise, whatsoever, of, in or to the same" (page 147).

Had this inadvertent misstatement of Chief Justice Russell in the syllabus been brought to the attention of plaintiff in error in time, it could and undoubtedly would have been corrected on rehearing.

(2) The chain of title however is not dependent on the two sample deeds printed in the record. These were the only deeds that could be actually found at the time of the trial; but the presumptions arising from the other facts proved, taken in conjunction with the fact, of which the Georgia courts took judicial notice, of the wholesale destruction of records during the Civil War, were regarded by Justice Custer and his associates as requiring at least the submission of the question of the chain of title to the jury; and as

pointed out in our principal brief the prevailing opinion clearly intimated that it was unnecessary to consider or decide this question. Even if one of the sales to Hammett appearing in the record "did not convey anything but personalty", the prevailing opinion did not decide anything as to the force of the presumption arising from the other facts, or of other sales to Hammett, one of which appears in the record and obviously includes right of way as well as personalty. The statement in Chief Justice Russell's opinion that

"We hold that there was a failure on the part of the defendant in the court below (plaintiff in error) to establish its contention that it was the owner of any interest whatsoever in the right of way in the Western and Atlantic Railroad, either by grant, prescription, or otherwise."

must be taken in connection with what follows:

"I am of the opinion that the judgment of the trial court in overruling (fol. 869) the motion for a new trial was right. There was no error in this ruling because, in my opinion, the verdict was demanded by the evidence for the reason that the case is controlled by two propositions under which the jury could not have found otherwise than they did, and for that reason the merits of all remaining assignments of error are irrelevant and immaterial. I freely concede that there were quite a number of errors in the conduct of the trial but none of them affected or could have affected the result reached in the case, and in my opinion, no other result could have been attained either as a matter of reason or of law.

"There can be no question that the state

is the owner of the right of way of the Western & Atlantic Railroad and has been its owner since the first beginning of the undertaking and from the time when the State invested its first dollar in the enterprise. It is immaterial whether the ownership is in fee or only an easement. But even if it be conceded for the sake of argument that the State only acquired an easement for its right of way it must be held that no right, interest, or enjoyment of even what the plaintiff in error admits is owned by the State has ever been lawfully granted by the State to anyone."

Taken as a whole, as we have already fully pointed out, the prevailing opinion shows that the question of the chain of title was not considered in reaching the conclusion that the judgment of the trial court was correct, and that the conclusion itself was based solely on the ground that the Augusta, Atlanta & Nashville Magnetic Telegraph Company never acquired any rights as against the State—in other words never had any contract which could be impaired.

Respectfully submitted,

JOHN G. MILBURN  
(of New York, N. Y.)

FRANCIS R. STARK  
(of New York, N. Y.)

ARTHUR HEYMAN  
(of Atlanta, Ga.)

WILLIAM L. CLAY  
(of Savannah, Ga.)

Attorneys for Western  
Union Telegraph Co.

**APPENDIX****Summary of**

***Kelly & Mitchell v. Morris, 31 Ga. 54  
(1860).***

The Augusta, Atlanta & Nashville Magnetic Telegraph Company was incorporated in 1852 by the acts of the legislatures of Georgia and Tennessee to construct a telegraph line from Augusta to Nashville. The line was completed in 1855, at great expense which left the company in debt. To pay off the indebtedness the stockholders made and authorized a mortgage on the lines of the company in both States. This mortgage was foreclosed in the State court of chancery at Nashville, Tenn., in 1856, and under the decree of foreclosure the entire property of the company in both States was sold to James Kelly and William Kelly, who later sold to the plaintiffs.

In the meanwhile Alvin D. Hammett and John H. Clover, judgment creditors of the company under common law judgments obtained in Georgia and docketed before the mortgage lien arose, purchased the entire property of the company within the State of Georgia at sheriffs' sales "in several counties in Georgia, through which the telegraphic line passes, and in which the 'fixtures, furniture', etc. were found;" (opinion of the court, page 59). After the foreclosure sale at Nashville, and before the sale by James Kelly and William Kelly to the plaintiffs, Hammett (for himself and Glover) sold the Georgia property

to the defendants, Dr. William S. Morris, Robert W. Crenshaw, John S. Langhorn and Charles Scott, "a company of gentlemen residing in Lynchburg, in the State of Virginia", and put them in possession.

This suit was brought in equity, in Fulton superior court, to enjoin the defendants from using the line and to compel an accounting to the plaintiffs. The theory of the suit was that Hammett, at the time of the foreclosure sale in Tennessee, was present at the sale, representing himself and Glover, and agreed for himself and Glover to release to James and William Kelly, the purchasers at the sale, all rights under the Georgia judgments (and consequently that they were estopped to assert thereafter any rights under the Georgia judgments). The defendants' theory was that this agreement by Hammett was conditional on payment of certain notes, which notes had not been paid (and consequently that the estoppel did not become operative). There was also a question whether the Tennessee court had any jurisdiction to sell any part of the line in Georgia.

The injunction was refused, and the plaintiff appealed to the supreme court of Georgia. That court refused to decide the question as to the jurisdiction of the Tennessee court, and affirmed the judgment on the ground that the defendants were in possession and that the plaintiffs had not shown any equity superior, or even equal, to the defendants'.

(7)

No. 2

Supreme Court, U.S.  
FILED  
JAN 14 1926  
W. A. STANBURY  
CLERK

**In the Supreme Court**

**United States**

**October Term, 1925**

**WESTERN UNION TELEGRAPH COMPANY, Petitioner**

**vs.**  
**State of Georgia**

**As Owner of Western & Atlantic Railroad  
and**

**NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY  
As Lessee Operating Said Railroad Under the Corporate  
Name and Style of  
Western & Atlantic Railroad, Respondents**

**PETITION FOR CERTIORARI**

**BRIEF OF RESPONDENTS IN OPPOSITION TO  
GRANT OF THE WRIT OF CERTIORARI**

**FREDERICK HALL,  
HUBERT C. PARSONS,  
MORRIS ALEXANDER,**

**Attorneys for Respondents**

**THE PEOPLE & THE**

**OF GEORGIA.**

---

# In the Supreme Court

OF THE

## United States

OCTOBER TERM, 1923

---

WESTERN UNION TELEGRAPH COMPANY, Petitioner

*versus*

STATE OF GEORGIA

As Owner of Western & Atlantic Railroad

and

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

As Lessee Operating Said Railroad Under the Corporate

Name and Style of

WESTERN & ATLANTIC RAILROAD, Respondents

---

PETITION FOR CERTIORARI

---

*BRIEF OF RESPONDENTS IN OPPOSITION TO  
GRANT OF THE WRIT OF CERTIORARI*

---

FITZGERALD HALL,

HENRY C. PEEPLES,

HOOPER ALEXANDER,

Attorneys for Respondents

TYE, PEEPLES & TYE,

Of Counsel.

---





# **SUBJECT INDEX**

	<b>Page</b>
Request for Denial of Writ of Certiorari.....	3
Failure to comply with Rule 37.....	3
No question of Public Importance involved.....	4
Petition for Certiorari not in Time.....	4-6
Questions as to "Full Faith and Credit" and Impair- ment of Contract made too late.....	6
Validity of State Statute for State Courts.....	11
Impairment of Contract by Judicial Decisions.....	12
Immunity under Telegraph Act of 1863.....	14
Action of Western & Atlantic Railroad Commission.....	16
Ownership of Western & Atlantic Railroad by State of Georgia.....	18
Former Litigation between parties.....	21

# INDEX OF CASES CITED

	Page
Bilby vs. Stewart .....	10
Cleveland & P. R. Co. vs Cleveland .....	13
Columbia Ry. & Co. vs South Carolina .....	14
Fallbrook Irrigation Dist. vs Bradley .....	11
Frank vs Mangum .....	13
Godchaux Co. vs Estopinal .....	10
Goldsmith vs Rome R. R. Co. ....	12
Green vs Frazier .....	11
Jett Brothers Distilling Co. vs Carrollton .....	5
Kennedy vs Supreme Lodge of Moose .....	11
Louisiana R. & N. Co. vs Berkman .....	14
McKay vs Kalyton .....	6
Martin vs Broach et al .....	12
Mayor of Macon vs Hughes .....	13
Mergenthaler L. Co. vs Davis & Hayes .....	10
Moore-Mansfield Co. vs Electrical Installation Co. ....	13
Munday vs Wisconsin Trust Co. ....	11, 12
New Orleans & North Eastern R. R. vs Scarlet .....	11
New Orleans Water Works Co. vs Louisiana &c Co. ....	14
Old Colony Trust Co. vs Omaha .....	11
Rindge Company vs County of Los Angeles .....	11
Rooker vs Fidelity Trust Co. ....	10
Ross vs Oregon .....	13
Rust Land & Lumber Co. vs Jackson et al .....	5
Western & Atlantic R. R. Co. vs Western Union Tele- graph Co. (138 Ga. 420) .....	19
Western & Atlantic R. R. Co. vs Western Union Tele- graph Co. (91 U. S. 283) .....	21
Western Union Tel. Co. vs Pennsylvania R. R. Co. ....	19
Western Union Tel. Co. vs State of Georgia .....	20
Western Union Tel. Co. vs Western & Atlantic R. R. Co. ....	20

# In the Supreme Court of the United States.

OCTOBER TERM, 1923

---

WESTERN UNION TELEGRAPH COMPANY, Petitioner

*versus*

STATE OF GEORGIA

As Owner of Western & Atlantic Railroad  
and

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

As Lessee Operating Said Railroad Under the Corporate

Name and Style of

WESTERN & ATLANTIC RAILROAD, Respondents

---

## *BRIEF OF RESPONDENTS ON PETITION FOR CERTIORARI*

---

MAY IT PLEASE THE HONORABLE COURT:

The respondents respectfully request that the petition for certiorari in this cause be denied for the following reasons:

### I

The petitioner, The Western Union Telegraph Company, has not complied with Rule 37 of this Court in that petitioner has failed to file as an exhibit to the petition a certified copy of the entire transcript of the record of the cause.

## II

There is no question of public importance involved. This is simply a controversy between the Western Union Telegraph Company and the State of Georgia and the lessee of the State of Georgia's railroad. Petitioner has had a thorough hearing in all the courts of Georgia. No question for the future guidance of the parties, no question of paramount interest, indeed no question of public interest at all is involved.

## III

### THE PETITION FOR CERTIORARI NOT PRESENTED IN TIME

Upon Writ of Error to the Superior Court of Fulton County, Georgia, the cause was taken by defendant below, (petitioner for the writ of certiorari), to the Supreme Court of Georgia. In that Court the decision of the Lower Court was affirmed by operation of law, the Justices of the Supreme Court of Georgia being in number equally divided as to whether the decision should be affirmed or reversed.

This was the only thing *decided*. Opinions were rendered expressing merely the views of members of the Court upon some of the questions made.

The judgment of the Supreme Court of Georgia, thus affirming the judgment of the lower Court, was rendered on the 13th day of September, 1923.

An application for rehearing was made by said defendant, which application was denied on September 29, 1923.

Under Rule 38 of the Supreme Court of Georgia no oral argument of such a motion will be allowed unless the Court shall issue a rule *nisi* thereon. No such rule was issued. The petition for rehearing was denied, by simple order of the Court, without further judgment or opinion.

The petition for certiorari was presented to the Supreme Court of the United States after more than three months from the judgment of affirmance. It was presented too late.

An application for a writ of certiorari to a State Court, made after the expiration of the three months limited by the Act of September 6, 1916 (39 Stat, at Large 726) cannot be entertained, irrespective of whether the record shows a proper case for the allowance of that writ.

Rust Land & Lumber Company vs. Jackson et al, 250 U. S. 71, 76.

The mere overruling, without opinion, of a petition for rehearing, cannot be made the basis of a writ of error.

Jett Brothers Distilling Co. vs. City of Carrollton, 252 U. S. 1, 7.

Nor can the claim of immunity under a law of the United States, made in a petition for rehearing, be made the basis of a writ of error, unless it was considered and decided adversely by the State Court.

McKay vs. Kalyton, 204 U. S. 458, 463. The same principle applies to a petition for certiorari.

#### IV

### QUESTIONS AS TO "FULL FAITH AND CREDIT" CLAUSE AND IMPAIRED OBLIGATION OF CONTRACT MADE TOO LATE

The Western Union Telegraph Company, based its claim to remain upon the right of way of the Western & Atlantic Railroad, property of the State of Georgia, among other things upon an alleged Act of the General Assembly of Georgia of January 27, 1852 (Ga Acts of 1851-2 p. 193).

It claimed that by this Act a prior contract, made between the chief engineer of the Western & Atlantic Railroad and Garst and Bean, for construction of a telegraph line along that railroad, had been ratified, and that said Act had granted to the Augusta, Atlanta and Nashville Magnetic Telegraph Company authority, in perpetuity, and assignable, to construct and maintain telegraph lines upon said right of way; and that by assignment the Western Union Telegraph Company had succeeded to said right.



The title of the Act was: "An Act to incorporate the Augusta, Atlanta and Nashville Magnetic Telegraph Company."

The plaintiffs below, the State of Georgia and the Nashville, Chattanooga & St. Louis Ry., (as Lessee of the Western & Atlantic Railroad), moved to strike that portion of the answer which claimed that this Act ratified the alleged contract between such chief engineer and Garst & Bean, upon the ground, among others, that that portion of the Act was unconstitutional, in that it was in contravention of the Constitution of the State of Georgia, of force when the Act was passed, which provided that no law or ordinance should pass "containing any matter different from what is expressed in the title thereof."

This motion to strike was sustained and to this ruling the said defendant excepted and assigned error upon it in the Supreme Court of Georgia.

Three of the Justices of that Court were of the opinion that the said Act was unconstitutional, and three that it was not, the respective views, *pro* and *con*, being stated in opinions rendered by Russell, Chief Justice and by Judge Custer, (presiding in the place of a Justice who was disqualified).

The motion for rehearing was entirely devoted to assertions that in holding the Act unconstitutional the Justices who so held had overlooked certain previous decisions of the Court and statutes of Georgia; did not pass upon the validity of the Garst & Bean contract, dis-

associated from its ratification by said Act of 1852, (nor did the other three Justices); that all the Justices had *lost sight* of an alleged contract of the year 1870 between Blodgett, then Superintendent of the Western & Atlantic Railroad and the Western Union Telegraph Company, approved by the then Governor of Georgia, (which had also been set up in the lower Court and held by that Court to be void because not authorized by the General Assembly); that all the Justices had overlooked certain resolutions of the General Assembly of Georgia; that all the Justices had overlooked differences between the claim of sovereignty of the State of Georgia as applicable to its railroad in Georgia, and as operating the part of the railroad in the State of Tennessee, citing certain decisions of the Supreme Court of Tennessee and certain statutes of that State; that the Court had, also, *lost sight* of the full faith and credit clause (Section 1, Paragraph 1 of Article 4) of the Constitution of the United States; that, in holding that the plea of *laches* was not available as against a sovereign State, the Court had *lost sight* of certain sections of the Code of Georgia, and, as this ruling applied both to Georgia and Tennessee, the Court had *overlooked* the above mentioned decisions of the Supreme Court of Tennessee and the full faith and credit clause of the Constitution of the United States; that the decision of Russell, C. J., concurred in by two other Justices, seemed to have overlooked statements in a report of said Chief Engineer as to his conversations with the then Governor of Georgia, followed by the said contract with Garst & Bean, and a statement in a letter of the Chief Engineer to the then Governor of Georgia, and testimony in the

case as to the value of a telegraph line to a railroad; that Russell, C. J., and said other two Justices had held that plaintiff must recover on the strength of its title, but had held, also, that the Court could take judicial notice of the fact that the State was the owner of the railroad, which holdings movant claimed were in conflict; that the same Justices held that it was immaterial whether the ownership was in fee or only of an easement, in doing which, as movant claimed, sight seemed to be lost of decisions of the Court as to differences between railroad rights of way and land and interests in land, and had apparently lost sight of the said full faith and credit clause, as to the part of the railroad which was in the State of Tennessee, citing some decisions of the Supreme Court of Tennessee.

It should be noted that in the motion for a rehearing the movant for the *first time* set up and relied upon the full faith and credit clause of the Constitution; and that the claim was not considered and decided adversely by the Court.

After filing the motion for rehearing, and two days before that motion was denied, the movant filed a paper in which it made "known to the Court" its claim that the decision of Russell, C. J., concurred in by said two Justices, and by operation of law the divided opinion of the Court holding, or sustaining the lower Court in holding, that the said Act of 1852 was unconstitutional, changed a rule of law of said Court and of the State of Georgia applicable to the contract made by said Act of 1852, and changed the rule of construction of said Court and State applicable to

the statute, which is repugnant to the Constitution of the United States and particularly to Art. 1, Sec. 10, par. 1 thereof, and which decision impairs the obligation of a contract, contrary to said provision.

This was the first time this particular claim had been asserted.

This paper was simply filed. It was never passed upon in any way. So far as appears it was never entertained or considered.

A Federal question first raised on a motion for rehearing in a State Appellate Court comes too late to serve as the basis of a writ of error from the Supreme Court of the United States.

Godchaux Co. vs Estopinal, 251 U. S. 179.

Mergenthaler L. Co. vs Davis and Hayes, 251 U. S., 256.

Bilby vs Stewart, 246 U. S. 255.

The same principle is applicable, of course, to petition for certiorari:

After judgment of affirmance it is too late to seek to raise the question as to validity of a statute, by petition for rehearing.

Rooker vs Fidelity Trust Co., decided by this Court Feby. 19, 1923, Advance Opinions No. 10, p. 339.

## V

### VALIDITY OF STATE STATUTE QUESTION FOR STATE COURTS

Error and not certiorari is the proper mode to review a judgment upholding a State statute, challenged as repugnant to the Constitution of the United States, or the laws of the United States.

Kennedy vs Supreme Lodge of Moose, 252 U. S., 411.

New Orleans & North Eastern R. R. vs Scarlet, 249 U. S. 528.

But the validity of a State statute, as to whether or not it conforms to the Constitution of the State,, is a question the decision of which by the highest State Court is not open to review even on writ of error.

Green vs Frazier, 253 U. S., 233.

Rindge Company vs County of Los Angeles, decided by this Court June 11, 1923, Advance Opinions No. 17, p. 704.

Old Colony Trust Co. vs Omaha, 230 U. S. 100, 116.

Fallbrook Irrigation Dist. vs Bradley, 164 U. S., 112.

Whether a State statute did or did not validate a contract theretofore unenforceable is a question for the State Courts to decide, and their decision is not subject to review in the Supreme Court of the United States.

Munday vs Wisconsin Trust Co., 252 U. S., 499.

## VI

### IMPAIRMENT OF CONTRACT BY JUDICIAL DECISIONS

The contract clause of the Constitution refers only to legislation subsequent in time to the contract alleged to have been impaired.

Munday vs Wisconsin Trust Co., 252 U. S., 499,  
*Supra.*

It is noteworthy that the only decision of the Supreme Court of Georgia which was cited by Judge Custer as sustaining the view that the said Act of 1852 was constitutional, to wit, Goldsmith vs. Rome R. R., 62 Ga., 473, was rendered long after the Act was passed, its rendition being at the Feby. Term, 1879.

Long prior to the decision in Goldsmith vs Rome R. R., and prior to the passage of said Act of 1852, to wit, in the case of Martin vs Broach et al. 6 Ga. 21, 27, decided in 1849 the Supreme Court of Georgia had said:

“Where the title specifies some of the objects for which the Statute was passed and contains this general clause, ‘and for other purposes therein contained,’ portions of the Act not specially indicated in the title, are, nevertheless, good, under this general clause.”

The necessity for such words as “and for other purposes” in order that the Act might be valid as to matters

not expressly indicated in the title, has since the decision in said case of *Martin vs Broach*, been repeatedly held by the Supreme Court of Georgia, and in *Mayor of Macon vs Hughes*, 110 Ga., 795, 797-804, the cases are considered and their effect fully stated. The title of said Act of 1852 contained *no such words*.

In holding that the Act of 1852 was unconstitutional Russell, C. J., and those Justices who concurred with him, followed a long line of authority, beginning almost with the creation of the Court.

And they did so as to an Act the title of which was simply to incorporate a telegraph company, whereas the body of the Act purported to give, what is claimed to be a perpetual and assignable right to portion of the right of way of the State's railroad, which it has jealously guarded.

That clause is not addressed to such impairments as may arise by mere judicial decisions in the State courts, without action by the Legislature, even though such Courts may have changed their decisions.

*Ross vs Oregon*, 227 U. S., 150, 161.

*Moore-Mansfield Constr. Co. vs Electrical Installation Co.*, 234 U. S., 619.

*Frank vs Mangum*, 237 U. S., 309, 344.  
*Cleveland & P. R. Co. vs Cleveland*, 235 U. S., 50.

The Constitution of the United States affords no pro-



tection against impairment of a contract by judicial decision.

Columbia Ry. & Co. vs State of South Carolina, decided by this Court Feby. 19, 1923, Advance Opinions No. 10 pamph p. 289.

Louisiana R. & N. Co. vs Behrman, 235 U. S., 146, 170.

New Orleans Water Works Co. vs Louisiana &c Co. 125 U. S., 18, 30.

## VII

### IMMUNITY UNDER THE TELEGRAPH ACT OF 1866

Claim was made by the Western Union Telegraph Company of certain rights under the Act of Congress of July 24, 1866, to aid in the construction of telegraph lines and secure to the Government the use of the same for postal, military and other purposes, and its acceptance of the restrictions and obligations of this Act.

But it was not contended, and if contended such a position could not be supported by any decision of this Court, that this Act and its acceptance by petitioner for certiorari, could give such petitioner the right to occupy property of others without their consent.

The contention was that the State of Georgia, in giving to the predecessors in title of said petitioner per-

petual and assignable easements (by the Act of 1852 above mentioned and by the contract of 1870 also above mentioned), had assented to and made it lawful for said Telegraph Company to make with the United States the contract evidenced by its acceptance of said Act of Congress of 1866.

But the said acceptance was made long before said Telegraph Company acquired, or claims to have acquired, any easement in the railroad right of way, and long before the year 1870.

And, if the Act of the General Assembly of Georgia was unconstitutional and the contract of 1870 was not valid, the said Telegraph Company did not acquire rights under them.

The Telegraph Act of Congress of 1866 did not and does not impose upon telegraph companies any obligation to maintain, use or sell easements or rights of way of their lines, when such easements or rights do not belong to such companies, and against the will of the real owners.

We respectfully contend that there appears no real and substantial question of denial of any title, right, privilege, or immunity under the Constitution or laws of the United States, involved in the judgment of the Supreme Court of Georgia, which would entitle petitioner to review *by certiorari*; the above mentioned claim under the Telegraph Act of 1866 being the only claim of such title, right, privilege or immunity.

## VIII

### ACTION OF THE WESTERN & ATLANTIC RAILROAD COMMISSION

The claim that the action taken by the Western & Atlantic Railroad Commission, in authorizing the institution of the instant suit against the Western Union Telegraph Company, deprived petitioner of its property without due process of law, because such authority was given without affording the Telegraph Company a hearing, if substantial and if decided adversely to it by the Supreme Court of Georgia, might be reversible by writ of error, but does not furnish ground for review by *certiorari*.

But there is no substance in the claim. The Western & Atlantic Railroad Commission did not *determine* that the Telegraph Company had no right to maintain or operate the line or lines in question, nor attempt to do so.

The Act of Nov. 30, 1915 (Georgia Acts of 1915—Extra Session, p. 119) does not give such authority to the Commission.

It does give the Commission authority to consider and determine, subject to the provisions of the Act:

“What, if any, steps should be taken to assert the right and title of the State to any part of the right of way or properties of the road that may be adversely claimed or occupied.” (Said Acts pps. 121 & 122.)

The amending Act of Aug. 4, 1916 (Georgia Acts of 1916, pps. 146 & 147) does not contemplate any action by the Commission finally determining the rights of any one contrary to his will, but empowers the Commission to institute suits to cause removal and discontinuance of encroachments.

And what the Commission did was to pass a resolution that, the lessee (the Nashville, Chattanooga & St. Louis Railway) having represented to it that the Telegraph Company was adversely using and occupying the right of way, without authority from the State and without the consent of the lessor, and requested the Commission to take appropriate action for removal of the encroachment and discontinuance of the adverse use; that counsel for the Commission having reported that the adverse use of the right of way by the Telegraph Company was without lawful authority from the State of Georgia, and that institution of *appropriate proceedings* for removal of the encroachment and discontinuance of the use was within the purview of the Act of Aug. 4, 1916 and the lease contract; therefore, it was resolved, that the counsel for the Commission be authorized and directed to institute and prosecute, in the name and behalf of the State, such suits, and legal proceedings as might be appropriate for removal of the encroachment and discontinuance of the use, provided the lessee should join in the suit and defray the expenses thereof, (according to the provisions of the lease contract.) Assertions, on pp. 13, 19, 23, 48-55 of the petition for certiorari (pp. 5, 7, 8, 16-19 of the petition for certiorari as printed) to the contrary of what is above stated, are not correct.

In pursuance of that authority the instant suit was instituted, and if any person has ever had opportunity to be heard to assert his claims the Western Union Telegraph Company has had such opportunity in this litigation.

## IX

### OWNERSHIP OF THE WESTERN & ATLANTIC RAILROAD BY THE STATE OF GEORGIA

The Western & Atlantic Railroad was built by the State of Georgia, from Atlanta, Georgia to Chattanooga, Tennessee, out of public funds and for public purposes. The railroad belongs, and has always belonged, to the State alone.

The public character of the enterprise and the nature of the ownership appeared in numerous Public Acts of the General Assembly of Georgia, beginning with the year 1836, and in every one of the various codifications of her statutes.

It was never questioned by defendant below that the State had a right of way for that railroad from Atlanta to Chattanooga, and that the telegraph lines were on that right of way. In fact it was expressly so admitted. It is expressly stated in the petition for certiorari (p. 4 of said petition, p. 2 of the petition as printed).

Not only is this true but the only right which defendant below claimed, to keep its lines on that right of way, was long occupancy thereof, by itself and predecessors in title, under alleged grants from the State.

So there was no inconsistency in the statement in the opinion of Chief Justice Russell as to how far it was necessary for the State to go to cast the burden upon the defendant.

Nor was it incorrect for him to say, as he did, that it was "immaterial at this time to decide whether the ownership" (of the right of way by the State) "is in fee or only an easement."

The Telegraph Company has in several cases unsuccessfully sought, as it did in the instant case, to derive advantage from the position that a railroad right of way is only an easement.

One of these cases is *Western Union Tel. Co. vs Pennsylvania R. R. Co.*, 195 U. S., 540, in which Mr. Justice McKenna, speaking for the Court, after considering many cases said (pp. 570-571):

"A railroad's right of way has, therefore, the substantiality of the fee, and it is private property, even to the public, in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or in part except upon the payment of compensation. In other words it is entitled to the protection of the Constitution, and in the precise manner in which protection is given."

In *Western Atlantic R. R. Co. vs Western Union Telegraph Co.*, 138 Ga. 420, it was held that:

“A telegraph company can not construct a line of telegraph over the land of the State without permission of the State.”

This was said of the very same right of way involved in the instant case. The Western Union Telegraph Company had, for many years, occupied the right of way under contract with the Nashville, Chattanooga & St. Louis Railway and upon the expiration of that contract sought to condemn the right of way. The State of Georgia afterward became a party to the litigation, the Governor of the State having been served with condemnation notice; and the Supreme Court of Georgia held that the Condemnation statutes did not apply to property owned by the State.

Western Union Tel. Co. vs Western & Atlantic Railroad Co., 142 Ga., 532.

Western Union Telegraph Co. vs. State of Georgia, 142 Ga., 535.

The condemnation proceedings in those cases expressly recognized the ownership of the right of way by the State and asserted that it was necessary for the Telegraph Company to acquire *by condemnation* the right of way for telegraph purposes.

Thereafter it abandoned its attempt to condemn but remained on the railroad right of way until the complaint in Equity was filed in the instant case.

All of the above appeared in evidence in the instant case.



## X

### FORMER LITIGATION BETWEEN THE WESTERN & ATLANTIC RAILROAD COMPANY AND THE WESTERN UNION TELEGRAPH COMPANY

Reference is made in the "Statement of the case and brief for petitioner, filed in support of the petition for certiorari," (pp. 29 and 30 of the printed copy), to litigation in 1872 between the Western & Atlantic R. R. Co. and the Western Union Telegraph Co., and the statement is made that the contract of 1870, herein before mentioned, was upheld in that case in 91 U. S., 283.

But neither the State of Georgia nor the Western & Atlantic Railroad, nor the Nashville, Chattanooga & St. Louis Ry., was a party to that cause. The then Western & Atlantic Railroad Company, was a distinct corporation, composed of private individuals, which in 1870 leased the road, for twenty years, from the State.

And in that case this Court expressly declined to pass on the question as to whether the contract of 1870 was or was not void.

We fear that much of what has been above said may be deemed unnecessary, and, it may be, out of place, because questions are discussed which could not be raised by petition for certiorari, but petitioner has sought to so raise them.

Believing that the petition was not filed in time, and that no substantial question, proper to be reviewed upon certiorari, is shown by the petition, we respectfully pray that the writ may be denied.

Respectfully submitted,

FITZGERALD HALL,

HENRY C. PEEPLES,

HOOPER ALEXANDER,

Attorneys for Respondents.

TYE, PEEPLES & TYE,

Of Counsel.

No. 24

APR 20 1925

WM. H. STANSBURY  
CLERK

**In the Supreme Court**  
OF THE

**United States**

OCTOBER TERM, 1925

**WESTERN UNION TELEGRAPH COMPANY**  
Plaintiff in Error and Petitioner for Writ of Certiorari  
VERSUS

**STATE OF GEORGIA**

**As Owner of Western & Atlantic Railroad**  
and

**NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY**

**As Lessee Operating Said Railroad, Defendants in Error**  
and Respondents to Petition for Certiorari.

**BRIEF FOR STATE OF GEORGIA AND NASHVILLE, CHATTANOOGA**  
**& ST. LOUIS RAILWAY**

**Defendants in Error and Respondents to Petition for**  
**Certiorari.**

**FITZGERALD HALL,**  
(of Nashville, Tenn.)

**HOOVER ALEXANDER,**  
(of Atlanta, Ga.)

**HENRY C. PEEPLES,**  
(of Atlanta, Ga.)

**Attorneys for Defendants in Error and Respondents**  
**THE PEEPLES & TYE,**  
**Of Counsel.**



---

---

# In the Supreme Court

OF THE

## United States

OCTOBER TERM, 1924

---

WESTERN UNION TELEGRAPH COMPANY

Plaintiff in Error and Petitioner for Writ of Certorari

*versus*

STATE OF GEORGIA

As Owner of Western & Atlantic Railroad

and

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

As Lessee Operating Said Railroad, Defendants in Error  
and Respondents to Petition for Certiorari.

---

BRIEF FOR STATE OF GEORGIA AND NASHVILLE, CHATTANOOGA  
& ST. LOUIS RAILWAY

Defendants in Error and Respondents to Petition for  
Certiorari.

FITZGERALD HALL,  
(of Nashville, Tenn.)

HOOPER ALEXANDER,  
(of Atlanta, Ga.)

HENRY C. PEEPLES,  
(of Atlanta, Ga.)

Attorneys for Defendants in Error and Respondents  
TYE PEEPLES & TYE,  
Of Counsel.

---

---



# CONTENTS

---

## STATUTES AND CASES CITED.

---

### STATEMENT OF FACTS.

#### ARGUMENT

---

#### I.

No impairment of obligation by contracts by lease of the Western & Atlantic Railroad, by Acts providing for such lease or by reso- lution of the Western & Atlantic Railroad Commission .....	37
No valid contract existed .....	41
Garst & Bean contract invalid .....	42,46
Act of 1852 incorporating Augusta, Atlanta & Nashville Magnetic Telegraph Company, was unconstitutional .....	46,57-59,61
Impairment of obligation of contract must be by legislation .....	52
Whether Act constitutional is for decision by State Supreme Court, as well as construc- tion of State Statutes .....	48

#### II.

General Statute of 1847 as to occupancy of public highway not applicable to railroad rights of way .....	63
--	----

#### III.

Title, right, privilege or immunity claimed	
---	--



under the constitution of the United States, not denied .....	66
--	----

#### IV.

As to alleged grants from the State of Georgia, and decision in Western Union Telegraph Company vs Western & Atlantic Railroad Company, 91 U. S. 283 .....	68-72
--	-------

#### V.

As to claim of perpetual right of way .....	72
---	----

#### VI

Licenses accompanied by expenditures ....	77
---	----

#### VII.

Decision of the Supreme Court of Georgia in the instant case should control .....	78
---	----

#### VIII.

As to collateral interpretation .....	81
---------------------------------------	----

#### IX.

No transmission of title into Western Union Telegraph Company shown by record or even indicated .....	84
No prescription, laches or presumption as against State .....	85-91

#### X.

Summary .....	91
---------------	----

## STATUTES CITED

	Page
Georgia Code	
Section 303 .....	43
Section 1287 .....	6
Georgia Statute, Dec. 21, 1836 .....	3
“ “ , Dec. 23, 1837 .....	4
“ “ , Dec. 29, 1838 .....	4
“ “ , Dec. 21, 1839 .....	4
“ “ , Dec. 22, 1843 .....	72
“ “ , Dec. 23, 1847 .....	5
“ “ , Dec. 29, 1847 .....	63
“ “ , Dec. 30, 1847 .....	72
“ “ , Feby. 23, 1850 .....	5
“ “ , Jany. 15, 1852 .....	6
“ “ , Jany. 27, 1852 .....	8
“ “ , Oct. 24, 1870 .....	69
“ “ , Aug. 26, 1872 .....	64
“ “ , Nov. 12, 1889 .....	10
“ “ , Nov. 30, 1915 .....	11,37
“ “ , Aug. 4, 1916 .....	12,38
Tennessee “ , Jany. 24, 1838 .....	4

## CASES CITED

	Page
Arkansas Valley &c vs Belding Mfg. Co., 127	
U. S. 379 .....	75
Alexander vs State, 56 Ga. 478 .....	85
Bacon vs Texas, 163 U. S. 207 .....	53
Banks vs State, 124 Ga. 16 .....	47
Bass vs Lawrence, 124 Ga. 75 .....	47,59
Birmingham &c Street R. Co. vs Birmingham	
Street R. Co., 79 Ala. 465 .....	77
Black et al vs Cohen, 52 Ga. 631 .....	58,62
Blair vs Chicago, 201 U. S. 400 .....	77,81
Bonner vs Milledgeville, 123 Ga. 115 .....	59,61
Bucher vs Cheshire R. Co., 125 U. S. 555 ....	60
Burek vs Taylor, 152 U. S. 634 .....	75
Butner vs Boifeuillet, 100 Ga. 752 .....	58
Chesapeake & D. Canal Co. vs U. S., 250 U. S.	
123 .....	87
Churchill vs Walker, 68 Ga. 681 .....	62
City of Opelika vs Opelika Sewer Co., 265 U.	
S. 215 .....	52
Colton vs Raymond, 114 Fed. 689 .....	75
Columbia Ry. &c Co. vs South Carolina, 261	
U. S. 236 .....	55
Commercial Bank vs Buckingham, 46 U. S. 317	55
Coosaw Min. Co. vs South Carolina, 144 U. S.	
550 .....	77
Dean vs Feeley, 69 Ga. 813 .....	86

Delaware County vs Diebold &c Co., 133 U. S. 473 .....	75
Desmoines Nat. B'k. vs Fairweather, 263 U. S. 103 .....	52
Detroit vs Detroit &c R. Co., 184 U. S. 368 ..	81
Dougherty vs W. & A. R. R., 53 Ga. 304 ....	43
Essex vs New England Tel. Co., 239 U. S. 321	73
Fleming et al vs Fleming, 264 U. S. 29 .....	50
Fletcher vs Fuller, 120 U. S. 534 .....	87
Forkas vs Smith, 147 Ga. 503 .....	62
Gelecke vs Dubuque, 1 Wall 205 .....	79
Georgia R. R. & Bkg. Co. vs Wright, 124 Ga. 618 .....	87
Glaze vs W. & A. R. R. Co., 67 Ga. 261 .....	85
Goldsmith vs Rome R. R. Co., 62 Ga. 478 ....	62
Herndon vs Strickland, 86 Ga. 323 .....	86
Hope vs Mayor &c of Gainesville, 72 Ga. 646	61
Howell vs State, 71 Ga. 224 .....	82
Inhabitants of Montclair vs Ramsdell, 107 U. S. 147 .....	79
Johnson vs Towsley, 13 Wall, 72 .....	84
Kirshner vs W. & A. R. R. Co., 67 Ga. 760 ..	86
Knights of Pythias vs Meyer, 265 U. S. 30 ..	52
Knox vs Exchange Bank, 79 U. S. 379 .....	55
Knoxville Water Co. vs Mayor &c Knoxville, 200 U. S. 22 .....	77
Langley vs Augusta, 118 Ga. 590 .....	86
Lehigh Water Co. vs Easton, 121 U. S. 388 ..	55
Lloyd vs Richardson, 158 Ga. 633 .....	62

Louisville vs Cumberland &c Co., 224 U. S.	
663 .....	73
L. & N. R. R. Co. vs W. U. Tel. Co., 195 Ala.	
124 .....	65
Martin vs Broach, 6 Ga. 21 .....	48,57,58,59
Mayor &c Macon vs Hughes, 110 Ga. 795 ....	47,58
Mayor &c Savannah vs State, 4 Ga. 28 .....	46,57,58
Morris & Co. vs Central R. Co., 19 N. J. Eq.	
372 .....	75
Muhlker vs New York &c R. Co., 197 U. S.	
544 .....	60
Munday vs Wisconsin Trust Co., 252 U. S. 499	53
McCoy vs Union Elevator Co., 247 U. S. 354	53
McGregor vs Hogan, 263 U. S. 234 .....	51
National &c Ass'n. vs Braham, 193 U. S. 635	53
New York Bank Note Co. vs Kidder Press	
Mfg. Co., 192 Mass. 405 .....	75
Norrell vs Augusta Ry. Co., 116 Ga. 313 ....	86
Oregon &c R. Co. vs Grubissich, 206 Fed. 577	88
Owensboro vs Cumberland Tel. Co., 250 U. S.	
58 .....	73
Peed vs McCrory, 94 Ga. 487 .....	62
Penitentiary Co. vs Gordon, Gov'r., 85 Ga. 159	44
Pike vs Waltham, 168 Mass. 581 .....	75
Plumb vs Christie, 103 Ga. 700 .....	61
Prothro vs Kendall, 12 Ga. 36 .....	46,58
Puget Sound Power Co. vs County of King,	
263 U. S. 22 .....	52
Rader vs Township of Union, 39 N. J. L. 509	80

Roberts vs Downing, 127 U. S. 607 .....	84
St. Clair County &c Co. vs Illinois, 96 U. S. 63 .....	76
St. Paul Gas Light Co. City of St. Paul, 181 U. S. 142 .....	54
Schlessinger vs Forest Products Co., 78 N. J. L. 642.....	75
South Western R. R. Co. vs S. & A. Tel. Co., 46 Ga. 43 .....	65
State of Georgia vs Cin. So. Ry. Co., 248 U. S. 26 .....	73
State of Georgia vs Paxon & Cannon, 119 Ga. 130 .....	85,86
State of Georgia vs So. West R. Co., 70 Ga. 12	43
Stearns vs Minnesota, 179 U. S. 223 .....	60
Terrace Et al vs Thompson, 263 U. S. 197 ..	51
Tidal Oil Co. vs Flanagan, 263 U. S. 444 ....	48
Tifton, T. & G. R. Co. vs Bedgood & Co., 116 Ga. 945 .....	74
Trustees Caledonia County vs Kent, 84 Vt. 12	88
U. S. vs Ala. Gt. So. R. Co., 142 U. S. 615 ....	84
U. S. vs B. & O. R. R. Co., 1 Hughes, 138 ....	83
U. S. vs Bell Tel. Co., 159 U. S. 554 .....	87
U. S. vs Bell Tel. Co., 167 U. S. 265 .....	87
U. S. vs Chavez, 159 U. S. 452 .....	89
U. S. vs Deveraux, 90 Fed. 182 .....	90
U. S. vs Hermonos, 209 U. S. 337 .....	84
U. S. vs Insley, 130 U. S. 265 .....	87
U S. vs Johnson, 124 U. S. 253.....	84

U. S. vs N. C. & St. L. Ry., 118 U. S. 120 . . . .	86
U. S. vs Philbrick, 120 U. S. 52 . . . . .	84
U. S. vs Thompson, 98 U. S. 486 . . . . .	87
Vickers vs Benson, 26 Ga. 590 . . . . .	86
Virginia vs West Virginia, 220 U. S. 34 . . . .	87
Wade vs Cornelia, 136 Ga. 89 . . . . .	86
Wade vs Travis County, 174 U. S. 499 . . . . .	60
Wellborn vs Estes, 70 Ga. 390 . . . . .	82
Wellborn vs State, 114 Ga. 793 . . . . .	61
Western & Atlantic R. R. Co. vs W. Un. Tel. Co., 138 Ga. 420 . . . . .	32
Western Union Tel. Co. vs L. & N. R. R. Co., 238 Fed. 34 . . . . .	78
Western Union Tel. Co. vs State of Georgia, 142 Ga. 535 . . . . .	33
Western Union Tel. Co. vs State of Georgia Et al, 156 Ga. 409 . . . . .	46
Western Union Tel. Co. vs W. & A. R. R. Co. 91 U. S. 283 . . . . .	69
Western Union Tel. Co. vs W. & A. R. R., 142 Ga. 532 . . . . .	33,45
Williamson vs Matthews, 32 Ga. 524 . . . . .	87
Zane vs County of Hamilton, 189 U. S. 370 . .	54



# In the Supreme Court of the United States

OCTOBER TERM, 1924

---

WESTERN UNION TELEGRAPH COMPANY  
Plaintiff in Error, and Petitioner for Writ  
of Certiorari

*versus*

STATE OF GEORGIA

As owner of Western & Atlantic Railroad  
and

Nashville, Chattanooga & St. Louis Railway  
As Lessees of Western & Atlantic Railroad

Defendants in Error and Respondents to Petition for  
Writ of Certiorari

---

## BRIEF FOR DEFENDANTS IN ERROR AND RESPONDENTS

---

### STATEMENT OF THE CASE

In the year 1836 the General Assembly of the State of Georgia passed an Act for the construction of the Western & Atlantic Railroad, "as a State work and with the funds of the State," from some point on the line of the State of Tennessee to some point on the Chattahoochee river in Georgia.

Record p. 129-201.

No.  
243

3

4

By Acts of 1837, 1838 and 1839 authority was given for the sale of interest bearing scrip, in order to procure funds for the work.

Record pps. 201-202.

In 1838 the Legislature of Tennessee passed an Act, with the caption, "An Act to authorize the State of Georgia to Extend Her W. & A. R. R. from the Georgia Line to Some Point on the Eastern Margin of the Tenn. River." This Act provided that the State of Georgia should be allowed the right of way for the extension and construction "of her said railroad," from the Georgia line to the Tennessee river, and that she shall be "entitled to all privileges, rights and immunities \* \* \* and be subject to the same restrictions, as far as they are applicable, as are granted, made and prescribed for the benefit, government and direction of the Hiawassee Railroad Company."

Record pps. 212-13.

By Act of the Legislature of Tennessee passed in 1848 it was provided that all the rights, privileges and immunities, with the same restrictions, which had been given to the Nashville and Chattanooga R. R. Company, by Act of Tennessee of Dec. 11th, 1845, were, so far as they were applicable, given to and conferred upon the State of Georgia, "to be enjoyed and exercised by that State in the construction of that part of the W. & A. R. R. lying in Hamilton County, Tennessee, and in the management of its business."

Record p. 213.

The Act of the Legislature of Tennessee, incorporating the Nashville & Chattanooga Railroad Company, gave to that company, among other things, the right to purchase and hold in fee or for a term of years any lands, etc., necessary for the road, and the right to acquire land for constructing the road by condemnation, the lands or right of way to vest in the company in fee simple.

Record pps. 213-215.

Similar provisions were in the Act incorporating the Hiawassee Railroad Company.

Record pps. 215-218.

The General Assembly of Georgia provided by an Act passed in 1847 "that it shall be the duty of the Governor to have completed, at the earliest practicable day, the W. & A. R. R. and that he cause the same to be equipped and used to the best advantage through its entire length from Atlanta to Chattanooga."

Record p. 209.

By an Act of Feby. 23rd, 1850, it was provided: "The Governor shall not sell at any time any part of the right of way heretofore acquired by the State, nor any property or land that may be necessary now, or at any other time, for the erection of depots, wood yards, or water stations, or for any other improvement necessary or convenient to said road."

Record p. 210.

By an Act of Jany. 15th, 1852, it was made the duty of the Governor of Georgia to appoint a Superintendent of the W. & A. R. R., and among other powers given such Superintendent were the following:

“He shall also contract for and purchase machinery, cars, materials, workshops, and all other things necessary and proper for the construction, repair and equipment of the road and its general working and business; but all contracts and expenditures which exceed the sum of five thousand dollars, shall be subject to the approval of the Governor.”

Record p. 211.

By the Code of Georgia, Section 1287, it is provided:

“The railroad communication from Atlanta in Fulton County, to Chattanooga, on the Tennessee river is the property of this State exclusively, and shall be known as the Western & Atlantic Railroad.”

Record p. 199.

On Oct. 11th, 1850, Wm. Mitchell, Chief Engineer of the Western & Atlantic Railroad, wrote a letter to David W. Garst and James M. Bean, in which he stated that having reflected as to their note of the day before and having had conversations with Governor Towns, (then

Governor of Georgia), and they, said Mitchell and Towns, being satisfied, not only from the nature of the telegraph but from experience of other roads, that there was no appendage more valuable in the efficient management of a railroad than a telegraph line, had concluded to submit to Garst and Bean this proposition:

“1. To furnish and erect the posts from Atlanta to Chattanooga \* \* \* \* \*.

2. To grant you the use of our right of way for the telegraph company, and to pass your officers and materials along the road free of charge.

3. For and in consideration of the foregoing, the W. & A. R. R. is to receive the sum of Five Thousand Dollars to be placed to its credit upon the books of the Telegraph Company, and instead of interest upon that sum is to receive dividends as they may be declared from time to time, and to be represented in the meetings of the company to that amount by the Chief Engineer, or such other person as may be appointed to represent the same.

4. And in further consideration of the foregoing services and grant, all the telegraph offices between Atlanta and Nashville erected by the company shall be subject to the use of said road free of charge, and said company shall erect as many offices as the road may require in addition to the regular offices of the company, but the latter shall be at the expense of the road.”

By reply of Oct. 11th, 1850, Garst and Bean accepted the above proposition.

The above appears from a report of said Mitchell to Governor Towns of Sept., 1851, in which report he states that Garst and Bean proposed to organize a company, called the "Augusta, Atlanta & Nashville Tel. Cop.," and to build for them a telegraph line from Atlanta to Nashville, which was subsequently made to embrace the Georgia Railroad and extend to Augusta; that Garst retired and Bean prosecuted the enterprise alone; that after the above mentioned acceptance by Garst and Bean he (Mitchell) passed an order that so soon as the telegraph company was sufficiently organized to warrant the undertaking, the resident engineer and roadmaster arrange to carry out "our" part of the contract, but "we" did not commence planting the posts until May, 1851; that the work had progressed slowly, but all the posts had been delivered and half or more planted and the wire stretched beyond Kingston; that "our" outlay of money for the job had been little beyond the cost of the posts, fifteen cents apiece, and "we" expect the line to be in working order as far as Chattanooga in a month or two more.

Record pps. 138-139.

On Jan'y. 27, 1852, the General Assembly of Georgia passed an Act the title or caption of which was:

"An Act to incorporate the Augusta, Atlanta and Nashville Magnetic Tel. Co."

By this Act certain persons, including James M. Bean, were declared a body corporate for constructing, etc., a line of telegraph from Augusta, through Atlanta to Nashville, or any other route through the State of Georgia.

Sec. VI of the Act provided:

“That the contract entered into on the eleventh day of October, 1850, by William L. Mitchell, Chief Engineer of the W. & A. R. R. and D. W. Garst and J. M. Bean on the part of said company, be and the same is hereby ratified and affirmed, and that at every election, each share shall entitle its holder to one vote. \* \* \* \*. And in case of an equal number of votes on both sides, the election shall be decided by lot, and the Chief Engineer of said railroad, or other officer having the chief control of said road for the time being, shall by himself, or his proxy, duly authorized, cast the vote to which the State is entitled under said contract.”

Sec. IX of the Act provided that said telegraph company “shall have power and authority to set up their fixtures along and across any highroad or highroads; and any railroad which now or may hereafter belong to this State \* \* \* \* without the same being held or deemed a public nuisance, or subject to be abated by any private person.”

Record pps. 280-282.

The State of Georgia, as such, constructed the railroad, and through officers and agents appointed and em-

ployed by it operated the same until, under an Act of its General Assembly of Oct. 24th, 1870, it was leased to Jos. E. Brown and his associates, known as the Western & Atlantic Railroad Company, for the term of twenty years from Dec. 27th, 1870. The lease Act authorized the lease of "the W. & A. R. R. which is the property of the State, together with all its houses, work shops, depots, rolling stock and appurtenances of every character," and the property leased was so described in the contract of lease.

Record pps. 218-219.

The property was operated by the said "Western & Atlantic Railroad Company" for said term of twenty years.

On Nov. 12th, 1889, the General Assembly of Georgia passed an Act authorizing the lease of the "W. & A. R. R. together with all its houses, workshops, rolling stock, depots and appurtenances of every kind and character," the lease to take effect after the expiration of the above stated lease.

Under this Act lease was made, July 18, 1890, to the Nashville, Chattanooga & St. Louis Railway of "the said W. & A. R. R., a railroad running from the City of Atlanta, in State of Georgia, to the City of Chattanooga, in the State of Tennessee, together with all its houses, work shops, rolling stock and appurtenances of every kind and character, being the property of the State of Georgia," for a term of twenty-nine years.

Record pps. 219.



Under the provisions of the lease Act of Nov. 12th, 1889, the leasing railroad corporation became a corporation operating the property under the corporate name of "Western & Atlantic Railroad Company."

On Nov. 30th, 1915, the General Assembly of Georgia passed an Act for the lease of the property to be effective upon the expiration of the last above named lease.

Under this Act a commission was created, known as the W. & A. R. R. Commission.

The Act provided that the Commission should, among other things, "consider and determine, subject to the provisions of this Act, the following:

" \* \* \* \* 8. What, if any steps should be taken to assert the right of title of the State to any part of the right of way or properties of the road that may be adversely used and occupied."

Also, (Sec. 8 of the Act), that the Commission was instructed and directed to prepare, so that the same might be presented to the General Assembly, with its report, bills carrying into effect any recommendation the Commission might make—"with respect to what steps should be taken to assert the right and title of the State to any part of the right of way of any part of the road that may be adversely used or occupied."

It was provided further by said Act that the persons

or corporation leasing the property if not already a corporation of Georgia, should become a corporation under the laws of Georgia, under the name of the "Western & Atlantic Railroad."

Record pps. 220-222.

By an Act of Aug. 14th, 1916, amendatory of the last above Act, it was provided:

"Section 5-A. The said Commission, subject to direction in specific cases by the General Assembly, is hereby given full power and authority in its discretion to deal with and dispose of any and all encroachments upon, and uses and occupancies of any part of the right of way and properties of the W. & A. R. R. by any person other than the present lessee, \* \* \* \* whether such encroachments, use or occupancy be permissive or adverse, and whether with or without claim of right therefor. The said Commission is hereby fully authorized and empowered to determine whether such encroachments, uses and occupancies, or any of them, shall be removed and discontinued, or whether they or any of them shall be permitted to remain, and, if so, to what extent and upon what terms and conditions. The said Commission is further authorized to adjust, settle, and finally dispose of any and all controversies that may exist or that may arise with respect to any adverse use or occupancy of any part of said right of way and properties \* \* \* \* in such manner and upon such terms

and conditions as it may deem the best interests of the State require; and all contracts and agreements that said Commission may make or enter into in settlement or disposition of all matters touching such adverse use and occupancies shall be binding upon the State. The said Commission is further authorized \* \* \* \* to take such action as it may deem proper and expedient to cause the removal and discontinuance of any encroachment,

use or occupancy of said right of way and properties which in its opinion should be removed or discontinued, and other legal proceedings as it may deem appropriate in protection of the State's interest, or the assertion of the State's title."

Record pps. 230-231.

Under the last above two Acts and another not important here, the properties were leased, by a contract of May 11th, 1917, to the Nashville, Chattanooga & St. Louis Railway for fifty years from Dec. 27th, 1919.

By Section Fourteenth of the lease contract it was provided:

"The right is hereby expressly reserved to the party of the first part (the State of Georgia) to remove and cause to be discontinued any or all encroachments and other adverse uses and occupancies in and upon the right of way or upon the other properties of the W. & A. R. R. or any part

thereof, whether maintained under claim of lawful right or otherwise; and to this end the party of the second part (N. C. & St. L. Ry.) hereby consents that the State may withhold delivery of possession, or right of possession to the party of the second part of such parts of the right of way and other properties as may be so adversely used or occupied, until such encroachments and other adverse uses and occupancies shall have been removed or discontinued; and the State of Georgia may, at its option and in such manner as it may deem best, proceed to remove such encroachments, uses and occupancies, acting therein in its own name and behalf as the owner of the property. \* \* \* \* the party of the second part will, if and when so requested, join with the State and become a party to any proceeding, judicial or otherwise, that may be instituted by and on behalf of the State for the purpose of freeing the right of way and property of the W. & A. R. R. from all adverse uses and occupancies; \* \* \* \* \*.

“When such adverse uses and occupancies shall have been removed by judicial proceedings or otherwise the use of the same for the remaining period of the lease shall inure to the benefit of the party of the second part to the same extent as the other portions of the right of way and properties herein conveyed shall inure to it under the terms and provisions of this contract.”

Record pps. 228-229.

Thereafter, the Nashville, Chattanooga & St. Louis Railway, lessee of the W. & A. R. R., having represented to said Western & Atlantic Railroad Commission that the Western Union Telegraph Company was adversely using and occupying the right of way of the railroad with lines, poles and wires and other appurtenances, without authority from the State of Georgia and against the consent of said N. C. & St. L. Ry., and having requested the said Commission to take appropriate action for the removal of the encroachment and discontinuance of this adverse use, in pursuance of the Act creating the Commission, as amended, and said paragraph 14 of the lease contract, the Commission authorized and directed its counsel to institute and prosecute, in the name and behalf of the State of Georgia, such suits and legal proceedings as might be appropriate for removal of the encroachment and discontinuance of said use, provided, the Nashville, Chattanooga & St. Louis Railway should join therein and defray the expense thereof.

Record pps. 39 and 40.

Thereafter, on Jan'y 28th, 1920, the State of Georgia, as owner of the Western & Atlantic Railroad, and the Nashville, Chattanooga & St. Louis Railway, as lessee from the State of said railroad, operating the railroad under the name and style of Western & Atlantic Railroad, brought their petition in Equity against the Western Union Telegraph Company, alleging, in brief:

The State is the sole and exclusive owner of the Western & Atlantic Railroad, together with its rights of way and properties, extending from Atlanta, Georgia, to Chattanooga, Tennessee. Said railroad was constructed as a great public work by the State of Georgia solely out of public funds. All of the property appertaining to it, including its right of way and terminals, is exclusively owned by the State, directly and immediately in its sovereign and governmental capacity. It has never been incorporated, has no capital stock, nor does it constitute a legal entity. It is public property, the income therefrom constitutes a part of the public revenue and is, under the laws of the State, devoted to public uses.

The Nashville, Chattanooga & St. Louis Railway is a corporation of Tennessee and operates the Western & Atlantic Railroad under lease from the State of Georgia dated May 11, 1917, duly executed.

The defendant is maintaining and operating over, upon and along the right of way of the Western & Atlantic Railroad, between Atlanta and Chattanooga, telegraph lines, poles, wires, etc., such use and occupation being without authority from the State of Georgia, contrary to the will and consent of the Nashville, Chattanooga & St. Louis Railway, as such lessee, and the same constitutes an unlawful encroachment upon said right of way and an adverse use thereof.

The continued use of such right of way by defendant is in derogation of the State's right and title thereto and operates adversely to the interests of its lessee, in the

full use and enjoyment of the right of way, and constitutes a continuing trespass and constantly recurring grievance.

The petition then set forth the Act of Nov. 30th, 1915, creating the Western & Atlantic Railroad Commission, and the amendment thereto of Aug. 4th, 1916, both hereinabove stated.

Also, paragraph 14 of the lease contract, also hereinabove stated.

Also, the resolution of the said Commission, also hereinabove stated; and alleged that this suit was brought in accordance with such authority and direction.

The petition prayed for decree declaring the defendant to be without lawful right or authority to use and occupy any portion of the right of way; and commanding it to desist from such use and occupation, to the end that the State and its lessee might enjoy the full and unrestricted use thereof, free from any adverse claim of right on the part of defendant; that defendant be enjoined from such use and occupation, entry upon or any act of trespass upon the right of way, and from disturbing or interfering with the unrestricted possession and use of said right of way by the State and its lessee; and that defendant be required, within reasonable time, to remove its wires, poles and structures from the right of way.

The defendant answered the petition, much of the answer being stricken on motion of plaintiffs.

Record pps. 74-78.

The contents of the answer to the petition, not stricken, briefly stated were:

It admitted the construction of the railroad, from Atlanta to Chattanooga, by the State of Georgia, and that the State is the owner of said railroad and of the easements or rights of way necessary therefor.

It admitted that the Nashville, Chattanooga & St. Louis Railway, under the terms of the Act of Nov. 30th, 1915, and the Acts amendatory thereof, became the lessee of said railroad; but it denied that said railway has acquired any right, title or interest in the lines of telegraph now owned by defendant, or in the easement and rights in land necessary therefor, and denied that said lines of telegraph and the easements and rights in land necessary therefor are included within or covered by the lease contract.

It admitted that the Western & Atlantic Railroad was until Dec. 27th, 1870 operated by the State of Georgia; that pursuant to the Act of Oct. 25th, 1870 the railroad was leased to a corporation known as the Western & Atlantic Railroad Company for a term of twenty years; that pursuant to the Act of Nov. 12th, 1889 it was leased for twenty years beginning Dec. 27th, 1890 to the Nashville, Chattanooga & St. Louis Railway, which by virtue of said Act and lease became a corporation under the name and style of the Western & Atlantic Railroad Company; and that pursuant to the Act of Nov. 30th, 1915



and amendments thereto it was leased for fifty years, beginning Dec. 27th, 1919 to the Nashville, Chattanooga & St. Louis Railway, which under the Act, as said lessee, became a corporation of Georgia under the name and style of Western & Atlantic Railroad.

It admitted that it is maintaining and operating, over, upon or along what is known as the right of way of the Western & Atlantic Railroad, between Atlanta and Chattanooga, telegraph lines, poles, wires and other appurtenances, describing the same.

It alleged that on Oct. 10th, 1850, Garst & Bean, who proposed to organize a corporation and build a telegraph line from Atlanta to Nashville, subsequently to extend to Augusta, made known such proposal to the Chief Engineer of the Western & Atlantic Railroad, and expressed a desire to procure the aid of said railroad in the construction of a line of telegraph by a corporation to be called the Augusta, Atlanta & Nashville Magnetic Telegraph Company; and that thereupon said Chief Engineer, W. L. Mitchell, on Oct. 11th, 1850 wrote to them a letter, copy of which was attached.

It alleged that by an Act of Jan. 27th, 1852, the State of Georgia incorporated the Augusta, Atlanta & Nashville Magnetic Telegraph Company, for doing business as a telegraph company, from Augusta, through Atlanta to Nashville, Tennessee, and by this Act expressly ratified and affirmed said contract entered into between said Chief Engineer and Garst and Bean on the part of said corporation; and further expressly enacted in said Act

that said corporation "shall have power and authority to set up their fixtures along and across any highroad or highroads; and any railroad which now or may hereafter belong to this State."

It alleged that under and by virtue of said last named contract and statute the first line of telegraph upon and along the Western & Atlantic Railroad was constructed and operated and that the Augusta, Atlanta & Nashville Magnetic Telegraph Company was thereby granted and acquired perpetual, irrevocable and assignable easements for the construction, maintenance and operation thereof.

It alleged that on Sept. 1st, 1858, Alvin D. Hammett conveyed to Wm. S. Morris et. al. all of the telegraph lines, properties and easements formerly belonging to said last named corporation and particularly those upon or along the Western & Atlantic Railroad from Atlanta to the dividing line between Georgia and Tennessee; and that on Nov. 13th, 1858 G. L. Willy conveyed to said Morris et al. all of the lines, properties and easements formerly belonging to said last named corporation, extending from Chattanooga, upon or along the Western & Atlantic Railroad, to the dividing line between Georgia and Tennessee; and that on Dec. 28th, 1859 said Morris et al. conveyed to the American Telegraph Company all of such lines, properties and easements, so acquired by them, extending from Chattanooga to Atlanta.

It is alleged that its use and occupation of the right of way of the Western & Atlantic Railroad was authorized and is lawful.

It admitted that such use and occupation was contrary to the will and consent of the Nashville, Chattanooga & St. Louis Railway; but alleged that any interference with and any removal of its lines of telegraph from the right of way, and any Georgia statute, law, judgment or decree so requiring, will deprive defendant of its lawful rights and properties, vested in and secured to it by the laws and constitutions of Georgia and of the United States, and will be unjust and inequitable to it.

It denied that plaintiffs, or either of them, had any right, title or interest in or to, or owned or were entitled to possession of said lines of telegraph and necessary easements; and alleged that on the contrary, it had exclusive right and title thereto and possession thereof, under lawful warrant; and it denied that it was a trespasser.

Record pps. 78-108.

In that portion of an amendment to its answer which was not stricken the defendant alleged that, because of the loss of original papers and the destruction of county records, during the Civil War, during the years 1861 and 1865 and the long lapse of time since that date, defendant is unable to attach copies of conveyances of the properties (rights of way) to A. D. Hammett or to George L. Willy, except certain exhibits attached.

These exhibits purported to be (1) a deed dated June 7, 1859, by the Sheriff of Richmond County, Georgia, (of which the City of Augusta is the County Seat, and

through which county the W. & A. R. R. does not extend), to A. D. Hammett, conveying to Hammett, in consideration of twenty dollars, all the wires, posts, insulators, etc., embracing every appurtenance belonging to the Augusta, Atlantic and Nashville Telegraph Company, in the limits of the County of Richmond.

The deed recited that the property was sold under an execution from the Superior Court of the County of Cobb, in favor of Camp & Hammett against said company.

Record p. 145.

(2) A deed by the Sheriff of DeKalb County, Georgia, (which county is not of those through which the Western & Atlantic Railroad extends) dated Jan'y. 4th, 1859, conveying to A. D. Hammett, in consideration of five dollars, all the property of the Augusta, Atlanta and Nashville Magnetic Telegraph Line situated in the County of DeKalb.

This deed recited that the property was sold under an execution from the Superior Court of Cobb County, issued "at the suit against the Augusta, Atlanta & Nashville Telegraph Company."

Record p. 146.

The defenses set up in the answer of the defendant and amendments thereto, which were stricken on motions of plaintiffs, briefly stated, were:

(1) A denial that the State of Georgia owned in fee simple any of the land in, through or over which the Western & Atlantic Railroad is constructed and operated.

(2) A denial that said railroad, including its right of way, is owned by said State in its sovereign or governmental capacity; and an allegation that the State, having embarked in the construction, maintenance and operation of a railroad, in doing so had waived, and "has always waived" its sovereign character in respect to the ownership, construction, maintenance and operation of said railroad.

(3) That the lines of telegraph upon, over and along the Western & Atlantic Railroad, or easements necessary therefor, had long previously to any of the above mentioned leases been, and, during the whole period of time covered by such leases, and up to the present time continued to be, possessed and owned exclusively and adversely by the defendant. That it has so owned, possessed and operated the same from the time it acquired the same about June 12th, 1866, and prior thereto its predecessors in title so owned, possessed and operated from the date of the first construction, about the year 1850.

(4) That by Act of Dec. 29th, 1847, the State of Georgia granted any company or individual the right to construct and operate lines of telegraph "upon any public road or highway in this State" and that the Western and Atlantic Railroad is a "public road or highway in this State" and is within the provisions of the Act.

(5) On information and belief, that during or about the year 1858 all of the lines, properties and easements of the last named corporation were sold, conveyed and delivered by it, or under levy and judicial sale, to A. D. Hammett and George L. Willy.

Conveyance on June 12th, 1866, by the American Telegraph Company to defendant of all the lines of telegraph, properties, easements and rights it possessed upon or along the right of way.

(6) By contract of Aug. 18th, 1870, between defendant and the Western & Atlantic Railroad, executed in behalf of the latter by its Superintendent and approved by the Governor of Georgia, the State of Georgia granted and conveyed to defendant a "perpetual right of way to erect and maintain telegraph lines along said railroad, of as many wires as it may deem necessary to its business and additional lines of poles whenever" defendant should so elect.

The preamble of this contract recited that it was entered into "in order to provide necessary facilities for the party of the second part (W. & A. R. R.) and to a better understanding of the terms on which the party of the first part (W. U. Tel. Co.) shall occupy the line of railroad of the party of the second part with the line or lines of telegraph wires belonging to the party of the first part, and to permanently settle and define the business relations" between the parties.

By a resolution of Oct. 22nd, 1887, the General As-

sembly of Georgia requested the Governor to instruct the Attorney General to examine into the facts and circumstances of the said contract of Aug. 18th, 1870, and if it should appear that good grounds existed to that end; notwithstanding which resolution no such action has ever been instituted, until the institution of the instant suit.

In any event the State is now barred by its laches and by the statutes of limitation from questioning the validity of said contract.

(7) Georgia statutes of limitation of actions for recovery of real estate and trespass upon or damages to real property, enacted in March, 1856.

(8) The extension by the State of Georgia of the Western & Atlantic Railroad into and in the State of Tennessee was not in the capacity of a sovereign, but only in the capacity of and with the rights of and subject to all the burdens and limitations imposed by law or equity upon a private person or ordinary railroad company, and subject to all the statutes of Tennessee relating to prescriptive title, to adverse possession, and to limitation upon the right to sue and such statutes were pleaded.

(Copy of said alleged statutes are on p. 121 of the Record).

(9) Prescription against the State and all others by adverse possession under color of title, by defendant and its predecessors in title, of the Garst & Bean contract and

the Act of the General Assembly of Georgia of Jan. 27th, 1852, by the other muniments of title above mentioned, and by the contract above mentioned, between the Western & Atlantic Railroad and the defendant of Aug. 18th, 1870.

(10) Art. 1, Sec. 8 of the Constitution of the United States, empowering Congress to regulate commerce between the States, and to establish post roads.

The Act of Congress, enacted thereunder, of July 24, 1866, to aid in the construction of telegraph lines, etc., and the amendments thereto, and the written acceptance thereof by defendant on June 8th, 1867.

(11) The large cost and expense incurred by defendant in erecting and maintaining the telegraph line, and the loss defendant would sustain if any of the poles, wires, etc., should be removed from the Western & Atlantic Railroad and its right of way, besides the loss incident to the destruction of this link of defendant's system, and the effect thereof upon its good will and business; the cost and expense of the construction, maintenance and equipment, and that the lines along and upon said right of way were intended to and did become an important, permanent part of defendant's system, being well known to the State of Georgia and to the various lessees of the Western & Atlantic Railroad; and none of them having ever objected to such construction, maintenance, equipment and operation.

(12) Denial that the Western & Atlantic Railroad



Commission or that the Governor who executed the last lease of that railroad, had any authority to insert in the lease contract the provisions of paragraph 14 of said contract, and particularly in so far as such provision claims rights to the lines of telegraph and easements of defendant.

Denial that the lease Act of Nov. 30th, 1915, or any amendment thereof, empowered such Commission to adopt the resolution or give the direction under which the instant suit was brought, or to institute this suit or any proceeding; or to question or attack defendant's right to construct, maintain and operate its said lines, or to seek to annul or have adjudged ineffective the grants or permits given by Georgia to defendant and its predecessors in title; or to remove or interfere with defendant's said lines of telegraph or easements; or to prevent or defeat the performance by defendant of its obligations under or to deprive defendant of the rights, properties and franchises acquired by it under said Act of Congress and its amendments.

Defendant alleges, if the Georgia Act of Nov. 30th, 1915, or any amendment thereto, has the force and effect and delegates the authority herein above denied, but which defendant understands is claimed for it by complainants and by said Commissioners, then the statute is opposed to both the Constitutions of the United States and of the State of Georgia; and in any event said Act and the resolution of the Commissioners, and this suit, and any decree giving to the statute the effect herein

denied to it by defendant, but claimed in this suit by complainants, and any decree upholding or enforcing said resolution and any decree granting the prayers of the petition will be violative of said Constitutions, in that thereby

(a) There will be an impairment of the obligation of contracts by a statute or law passed subsequently which violates Art. 1, Sec. 3 par. 2 of the Georgia Constitution, and Art. 1, Sec. 10, Par. 1 of the Constitution of the United States.

(b) The State of Georgia will have made and enforced a law revoking grants of privileges or immunities to defendant and its predecessors in such manner as to work injustice to defendant, which violates Georgia Constitution Art. 1, Sec. 3, Par. 3.

(c) The rights, privileges and immunities which as above alleged have vested in or accrued to defendant, under the Acts of the General Assembly of Georgia, will not be held inviolate by all courts before whom they may be brought in question, which violates Georgia Constitution Art. 12, Sec. 1, Par. 5.

(d) Thereby property of defendant will have been taken without due process of law, violating.

Georgia Constitution Art. 12, Sec. 1, Par. 5.  
United States Constitution 14th Amendment.  
United States Constitution 14th Amendment,  
Par. 1.

By those portions which were stricken of the amended answer of defendant, similar defences were made, the purport of which is sufficiently above stated.

Exceptions to the rulings of the Court sustaining the motions to strike were duly made.

Among other things appearing in evidence on the trial of the cause were the following:

The admissions made by the defendant that the State of Georgia constructed the railroad out of public funds; and that the State is the owner of said railroad and the rights of way and easements necessary therefor.

Admission that the State operated the railroad until Dec. 27th, 1870.

Admission of the various Acts of the General Assembly authorizing leases of the railroad and of the lease contracts made thereunder.

Admission that defendant was maintaining and operating along the Western & Atlantic Railroad between Atlanta and Chattanooga, telegraph lines, poles, wires, etc.

In the year 1884, prior to the first lease of the railroad to the Nashville, Chattanooga & St. Louis Railway, a contract was made between the Western Union Telegraph Company and that railroad and other railroad companies, for themselves and any railroad that might

be acquired by them, respectively, either by lease or purchase, for the maintaining and operating telegraph lines of said telegraph company upon the lines of said railroads. This contract provided that it was to continue in force for twenty-five years from July 1, 1884, and thereafter until one year after written notice should be given by either party to the other of a desire and intention to terminate it. By virtue of this contract defendant maintained and operated its telegraph lines on the right of way of the Western & Atlantic Railroad from the time of the beginning of the first lease of that railroad to the Nashville, Chattanooga & St. Louis Railway in Dec. 1889 until, under notice given by the telegraph company, under the provisions of said contract of 1884, said contract last referred to expired on Aug. 17th, 1912.

On Jan. 18th, 1912 the telegraph company served notice on the Western & Atlantic Railroad Company (the corporate name under which the railroad was then operated by the Nashville, Chattanooga & St. Louis Railway, lessee) that the telegraph company "proposes and intends to acquire from you by condemnation \* \* \* \* along the right of way of your railroads in Georgia, a right of way upon which to construct (when necessary), maintain and operate its telegraph line. The location of the right of way sought to be acquired is substantially that location now occupied by the telegraph line of the Western Union Telegraph Company along main line of your railroad from Atlanta, Ga., to the Tennessee line."

"The Western Union Telegraph Company desires the above described right of way for the pur-

poses herein specified, for a term expiring 27th day of December, 1919, said date being the expiration of your lease with the State.”

Admission by the defendant that the right of way sought to be condemned “is the property of the State of Georgia.”

Allegation by defendant that it was necessary for it, in the carrying on of its business, to condemn that portion of the right of way set out in the notice of proposed condemnation.

On Aug. 5th, 1912 the Western & Atlantic Railroad Company notified defendant that on and after Aug. 17th, 1912, use and occupation by defendant of the right of way for a telegraph line would be against the will of the railroad Company; that the telegraph company was notified to vacate the right of way and complete the work of removal by Dec. 1st, 1912, but the latter did not begin such removal and still occupies along the right of way the locations it occupied before said notice was given.

After service upon it by the telegraph company of the condemnation notice above mentioned, the Western & Atlantic Railroad filed its petition in Equity, against the telegraph company, seeking to enjoin such condemnation, and the admissions above stated made by defendant were for the most part those contained in its answer to said petition for injunction.

After said petition for injunction was filed the defend-

ant telegraph company made a motion to advance the hearing of the cause.

In this motion, filed Feb. 7th, 1912, it alleged:

“Defendant is now occupying with its line of telegraph a right of way on the railroad right of way of said petitioner under a contract which will expire August 17th, 1912.

Defendant shows that it is only six months until the contract under which it now occupies the right of way of said petitioner will expire, and that it is very important that the right of defendant to condemn said property, and if adjudged favorably to defendant, the condemnation proceedings in connection therewith, be had and determined by the expiration of said time.”

Injunction having been denied by the lower Court the railroad company took writ of error to the Supreme Court of Georgia. That Court reversed the decision of the lower Court, holding, among other things, that a telegraph company could not construct a line of telegraph over the land of the State without permission of the State, and that the Code of Georgia did not grant that permission except upon due compensation.

Western & Atlantic Railroad Company vs.  
Western Union Telegraph Company, 138 Ga. 420.

Thereafter, on Dec. 9th, 1912 the telegraph company served upon the railroad company, what the former styled an amendment to its condemnation notice and the

railroad company, by amendment to its petition in Equity above mentioned, sought to enjoin the proposed condemnation.

In August, 1912, after the decision of the Supreme Court of Georgia above noted, the telegraph company served upon the Governor of Georgia what purported to be a notice to the State that the former desired to acquire a right of way upon which to maintain and operate a telegraph line on the lands composing the right of way of the W. & A. R. R., the property of said State," for a perpetual term, making an offer of a certain sum for the right of way and stating that unless the offer were accepted by a certain time proceedings to condemn would be instituted.

The State of Georgia thereupon filed its petition in Equity to enjoin the proposed condemnation.

Injunction was granted by the lower Court to the railroad company and the State.

The telegraph company took those cases to the Supreme Court of Georgia, which affirmed the decisions.

Western Union Telegraph Company vs. Western & Atlantic Railroad Company, 142 Ga. 532.

Western Union Telegraph Company vs. State of Georgia, 142 Ga. 535.

Both these cases were decided Sept. 30th, 1914.

In them it was held, that the statute providing for the condemnation of property for public use was applicable only to privately owned property, and not to property owned by the State.

Further, that as the usufructuary interest of the lessee of the railroad belonging to the State was not subject to condemnation as an independent estate or interest in land, and as no legislative provision was made for condemning the State's property, grant of injunction was not erroneous.

Upon the trial of the instant case there was evidence further, among other things, tending to show that the location of the telegraph lines in question interfered with the operation of wrecking machines and cranes, clearing up wrecks; that wires and poles in sleet storms fell on the railroad tracks; that it is a very great inconvenience, and burden upon the operating department of the railroad to have a line of poles, with wires and cross arms occupying any part of the right of way, especially if the men who are to maintain the telegraph line are not under the orders of the Superintendent of that division, because it is at many points in close proximity to the track and interferes with a number of operations.

The jury in the instant case found, among other things, that the State was the sole and exclusive owner of the right of way of the Western & Atlantic Railroad from Atlanta, Ga., to Chattanooga, Tenn., in its sovereign or governmental capacity; that defendant was maintaining and operating over, along and upon said right of way,



telegraph lines, poles, etc., without authority from the State or the lessee, the same being an unlawful encroachment on said right of way and an adverse use thereof; and that defendant should remove its property from the right of way within twelve months from the date of the verdict, the same being a reasonable time.

Decree was entered in accordance with the verdict.

Defendant's motion for a new trial was overruled and it took the cause to the Supreme Court of Georgia.

At the motion for new trial contained more than one hundred grounds, a statement of them is not made here.

The nature of all of them, so far as seems material now, has been sufficiently indicated by what is above stated or will be so indicated hereinafter.

The Supreme Court of Georgia, being composed of six Justices, the decision of the lower Court was affirmed by an equally divided number of justices.

Western Union Tel. Co. vs State of Georgia et al., 156 Ga. 409.

Those justices who were in favor of affirmance held:

“The State of Georgia in its sovereign capacity is the owner of the Western & Atlantic Railroad and the right of way upon which it is constructed. Section 6 of the Act of 1852, the caption of which is ‘An Act to incorporate the Augusta, Atlanta and Nashville Magnetic Telegraph Company’, is

void, because it violates the clause of the constitution of 1798 which provides: 'Nor shall any law or ordinance pass, containing matter different from what is expressed in the title thereof'."

Under the doctrine of *nullum tempus occurrit regi*, adverse possession as against the State of Georgia cannot provide the basis for a prescriptive title; and the State is not affected by a statute of limitations unless it expressly consents to be held subject thereto."

"Under the facts of this case a title by prescription could not be ripened by the possession of the predecessor in title of the plaintiff in error within the period of time when the State may be held to have waived the operation of the statute of limitations."

"The plea of laches is not available as against a sovereign State. The State cannot be guilty of negligence or any other similar act involving the omission to perform a duty devolving upon an ordinary citizen."

"The sale to Hammett did not convey anything but personalty."

Those justices who were for reversal, were of opinion that the Act of 1852 was constitutional and together with the Garst & Bean contract above mentioned, had the effect of granting to the telegraph company the franchise

which permitted it to maintain and operate a telgraph line over the right of way; and that defendant should have been allowed to deraign its title under successive conveyances from the Magnetic Telegraph Company to itself.

These justices concurred with the other justices upon the question as to whether or not prescription would ripen against the State, or the lapse of time could be made the basis of prescription, and as to whether the State lost its right to assert title to any part of its right of way by laches.

Defendant moved for a rehearing, which was denied.

It thereupon brought the case to this Court by writ of error; and, also, filed its petition for certiorari.

## I.

### IMPAIRMENT OF OBLIGATION OF CONTRACTS BY LEASE OF THE WESTERN & ATLANTIC RAILROAD, BY ACTS PROVIDING FOR SUCH LEASE AND BY RESOLUTION OF THE WES- TERN & ATLANTIC RAILROAD COMMISSION.

The Western & Atlantic Railroad, being the property of the State of Georgia that State, of course, had the right to lease the same.

The original Act providing for the lease, (Act of Nov. 30, 1915, Record pps. 220-222), contains nothing which

could impair the obligation of any valid contract previously made by the state.

It creates a commission to determine the terms and conditions upon which the lease should be made.

It provides that, among other duties, the commission should consider and determine what steps, if any, should be taken to assert the title of the State to any part of the right of way that may be adversely used and occupied; and should prepare, so that the same might be presented to the General Assembly, bills carrying into effect any recommendation it might make with respect to what steps should be taken to assert the right and title of the State to any part of the road that might be adversely used or occupied.

Surely there is nothing in this Act which in any way impairs the obligation of any valid contract theretofore made.

It provides that what belonged to the State should be leased and that inquiry and report should be made to what part of the property of the State, if any, was adversely used and occupied. No authority is given to lease anything not the property of the State of Georgia.

The Act of Aug. 4, 1916, amendatory of the last above named Act (Record pps. 230-231), empowered the Commission to deal with and dispose of encroachments upon and uses and occupancies of any part of the right of way by any person other than the then lessee, whether the

encroachment, use, or occupancy be permissive or adverse, and whether with or without claim of right therefor; to determine whether such encroachments, uses and occupancies should be removed and discontinued, or permitted to remain, and, if so, to what extent and upon what terms; to adjust and dispose of all controversies that might exist or arise with respect to adverse uses or occupancies; and to take such action as it might deem proper to cause the removal and discontinuance of any encroachment, use or occupancy, and to this end "*to institute and prosecute \* \* \* such suits and other legal proceedings as it might deem appropriate of the State's interests, or the assertion of the State's title.*" (Italics ours.)

An unbiased examination of this Act must result in the conclusion that its purpose was to empower the Commission to examine into what uses and occupancies there were; what were deemed by it, as the result of such examination, unauthorized; whether steps should be taken to remove unauthorized occupancies; to make adjustments as to such as could be adjusted, without litigation; and, as to such as could not be adjusted, to institute suits and other legal proceedings as it might deem appropriate in protection of the State's interest, or assertion of the State's title.

Surely the obligation of a contract is not impaired by an Act providing for enquiry as to whether such a contract exists and whether it is a valid and binding contract, and authorizing the testing of these questions by a suit.

The lease contract, (Record pps. 222-230), covered

“the said W. & A. R. R., a railroad running from the City of Atlanta \* \* \* to the City of Chattanooga \* \* \*, together with all its houses, work shops, rolling stock, depots and appurtenances of every kind and character, belonging and appertaining to said railroad,” with certain exceptions not here important.

This contract, neither in letter or spirit, was intended to cover or does cover anything not the property of the State of Georgia. As to those portions of the property which did belong to the State but which were adversely used or occupied it reserved to the State the right to withhold delivery of them to the lessee, proceed to remove them in such manner as it might deem best, and, if suit became necessary, it provided that such suit should be brought by the State and joined in by the lessee, should the lessee be so requested.

In other words the State, if and when it saw proper, was to examine into what, if any, part of the property was adversely used, remove the encroachments in any lawful way short of suit, as it might deem proper, and if it became necessary to sue, bring suit, should it be so disposed, in which suit the lessee should join.

How this can be held to fall within the inhibition of the Constitution, forbidding any State to pass any “law impairing the obligation of contracts,” is not apparent. The question as to whether there was a valid contract, existing when the lease was made, was not foreclosed nor could it be by the lease Act or the lease contract. Any right of any party to pre-existing contracts was not im-

paired. A "day in court" was contemplated in case of disputes not otherwise adjusted, and, certainly, a "day in court" has been had by the plaintiff in the instant case.

It is complained that the resolution of the Western & Atlantic Railroad Commission, authorizing and directing the institution of the instant suit, (Record p. 39) itself impairs the obligation of contracts.

Is it possible that direction to institute a suit to determine whether or not adverse occupation of a right of way is lawful, can be held to fall within the inhibition of the Constitution?

It is to be noted that, upon the trial of the case, the jury was instructed that recitals in this resolution, as to what had been represented to the Commission, were not admitted as evidence to prove the truth of what was so represented but only as a statement that such representations had been made to the Commission.

(Record p. 232).

(1). Even if it could possibly be held, and we cannot see how it could be so held, that such legislative acts or the contract of lease, might impair the obligation of a valid contract, there was no valid contract between the State of Georgia and the Western Union Telegraph Company, or its predecessors in title.

Two alleged contracts are relied upon by the Telegraph Company:

(a) Contract springing out of the correspondence of 1850 between Wm. Mitchell, Superintendent of the Western & Atlantic Railroad, and Garst and Bean, as ratified by the Act of the General Assembly of Georgia of 1852, for the incorporation of the Augusta, Atlanta & Nashville Magnetic Telegraph Company, accompanied by grant of privileges in such Act.

(b) Contract of 1870 between the Superintendent of the Western & Atlantic Railroad, and the Western Union Telegraph Company, approved by the Governor of Georgia.

As to the first of these alleged contracts:

It is evident that Garst & Bean and those persons promoting the incorporation of the Augusta, Atlanta & Nashville Magnetic Telegraph Company did not believe that Mitchell, Superintendent of the W. & A. R. R., though his action were approved by the Governor of the State, could sell or bargain away the right of way of the railroad or important easements thereon, because they undertook to have such bargain ratified by the General Assembly of Georgia.

In believing that legislative grant or ratification was necessary they were right.

No authority had been given to any one to part with the right of way, or to give, grant or contract for an easement therein or thereon, with any one. That right of way was most jealously guarded and nothing but express



legislative authority could authorize the granting of the easement claimed. No grant could be *presumed* where legislative grant was necessary.

“Powers of all public officers are defined by law, and all persons must take notice thereof. The public cannot be estopped by the acts of any officer done in the exercise of a power not conferred.”

Code of Georgia of 1910, Sec. 303.

“The Attorney General had no power to make any such contract or compromise, or to release the Company from any part of the ad valorem tax imposed.”

State of Georgia vs South Western Railway, 70 Ga. 12.

“Nor would the Governor have power to make any such contract or release; he could not do more than suspend the collection of the tax until the meeting of the next General Assembly.”

Ibid.

“No officer of the Western & Atlantic Railroad could, by any agreement or negotiation with the purchaser, made without authority of law, bind the State. No such authority was shown giving power to such officer to make admissions recognizing title out of the State, nor does the mere fact that complainant, or any one under whom she

claims, did, by the acquiescence of such officer, hold possession for awhile, or exercise dominion over a portion of the right of way, affect the State, so far as they concern the ascertainment of the true boundary thereof, or the right and title of the State to the same \* \* \*. No acts or agreement with unauthorized officers of the State could take either away. No statute of limitation or prescription ran against the State so as to be a bar."

Dougherty vs W. & A. R. R., 53 Ga. 304, 314.

"The Governor had no power to compromise a claim due the State by the defendant on account of negligent escapes."

Penitentiary Co. No. 2 vs. Gordon, Governor, 85 Ga. 159.

"All persons dealing with a public officer must at their peril ascertain the extent of his authority, and one who claims title through the act of such an officer is bound to see that his powers were adequate to the transaction undertaken. The State cannot be estopped by the acts of any of its officers, done in the exercise of a power not conferred upon them, any more than it can be bound by contracts made by its officers which they were not empowered to make. The powers of all officers are defined and conferred by law, and of these all persons who deal with them must take notice. Acts done in excess of the power conferred are not official acts.

Id. p. 171.

“The Governor has no right to contract away the State’s property at his pleasure or discretion. It is his duty to protect the property of the State, but he is not given any authority to sell the State’s property, or to contract with reference thereto. \* \* \* \* But no power conferred upon the Governor by the Code authorizes his consent to the sale of any property of the State, *or any easement or interest* in the State’s property. The power to dispose of property belonging to the State is vested in the legislature. 36 Cyc. 870. And the Governor would have no right to usurp the legislative function in the matter of contracting away the State’s property, or any interest therein.” (Italics ours).

Western Union Tel. Co. vs W. & A. R. R. Co.,  
142 Ga. 532, 534.

The language quoted last above is taken from the opinion of the Supreme Court of Georgia, in the case in which the telegraph company, sought to condemn the very right of way in question in the instant case and in which it asserted, (recognizing that it had no title), that it was necessary for it to acquire the same by condemnation.

From the time of the institution of such condemnation proceeding in 1911 up to the present time the telegraph company has been occupying this same right of way, despite the efforts of the State to have it cease such occupancy.

But it now claims that though the alleged contract with Garst and Bean were not binding upon the State, because without the authority of Mitchell, Superintendent of the railroad, the contract was ratified and perpetual, assignable power to occupy the right of way, was given to the Augusta, Atlanta & Nashville Magnetic Telegraph Company by Act of the General Assembly of Georgia of 1852.

But that Act was unconstitutional, because in conflict with the Constitution of Georgia of force when the Act was passed.

Western Union Telegraph Co. vs State of Georgia et al, 156 Ga. 409, *Supra*.

This decision was made in the instant case, affirming the decision in the lower court.

An effort has been made to attack this holding, by motion for rehearing, upon the alleged ground that it was in conflict with other decisions of the Supreme Court of Georgia, but the motion for a rehearing was denied.

The Supreme Court of Georgia but followed a long line of decisions of that Court, going back certainly as far as the case of Mayor of Savannah vs State, 4 Ga. 28, decided in 1848, which was followed in Prothro vs Orr, 12 Ga. 36, decided in 1852.

In the latter case it was held:

“The 5th Section of the Act of 1809 and the 3rd

Section of the Act of 1823 declared to be unconstitutional and void, on the ground that they contain matter *different* from what is expressed in the titles of the Acts to which they respectively belong." In the same case it was said: "It is a common practice to pass bills by their title only, without requiring them to be read in their progress through each branch of the General Assembly. To prevent fraud and surprise, how important it is that the members should be notified at least by the *title* of the act, of the subject matter about which they are legislating."

To the same effect see

Mayor of Macon vs Hughes, 110 Ga. 795, 797-804.

Banks vs State, 124 Ga. 16.

Bass vs Lawrence, 124 Ga. 75, 76.

In the latter case it is said, p. 76:

"In the Mayor of Macon vs Hughes, 110 Ga. 795, after an elaborate collection and examination of the previous adjudications of this Court, it was held that where the title of an Act specifies some of the objects for which the statute was passed and contains the general expression 'and for other purposes,' any legislation could constitutionally be embodied in the body of the Act which was germane to the general subject expressed in the title."

The same ruling had been made in *Martin vs Broach*, 6 Ga. 21, 27, decided in 1849.

The title of the Act of 1852 to incorporate the Aug., Atlanta & Nashville Mag. Tel. Co., did not contain any such general expression.

It is urged by plaintiff in error that the decision in the instant case on the question of the constitutionality of the Act of 1852 is opposed to some other decisions of the Supreme Court of Georgia.

Conceding, for the sake of argument only, that this be true, the decision of the Supreme Court of Georgia, in the instant case in holding said Act unconstitutional will be upheld by this Court.

“The parties to this action have been fully heard in the State Court in the regular course of judicial proceedings, and in such a case the mere fact that the State Court reversed a former decision, to the prejudice of one party, does not take away his property without due process of law.”

*Tidal Oil Co. vs Flanagan*, 263 U. S. 444, 450.

“It has been settled by a long line of decisions that the provisions of Sec. 10, Article 1 of the Federal Constitution, protecting the obligation of contracts against State action is directed only against impairment by legislation, and not by the judgments of courts.”

*Ibid.*

By the amendment of Feb. 17, 1922 to Sec. 237 of the Judicial Code it was provided:

“In any suit involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest Court of a State applicable to such contract would be repugnant to the Constitution of the United States, the Supreme Court shall, upon writ of error, re-examine, reverse, or affirm the final judgment of the highest Court of a State in which a decision in the suit could be had, if said claim is made in said Court at any time before said final judgment is entered and if the decision is against the claim so made.”

In commenting on this amendment, in the opinion in the above stated case, it is said:

“Counsel say: \* \* \* \*’Evidently the amendment of Feb. 17, 1922 to Sec. 237 of the Judicial Code was for the express purpose of extending the appellate jurisdiction of this Court to cover cases involving the impairment of contract obligations by change of judicial decision in the construction of applicable statutes. This is the plain language of the Act.’

The intention of Congress was not, we think, to add to the general appellate jurisdiction of this Court existing under prior legislation, but rather to permit a review on writ of error in a particular

class of cases in which the defeated party claims that his Federal Constitutional rights have been violated by the judgment of the State Court itself, and further to permit the raising of the objection after the handing down of the opinion. \* \* \* This Act was intended to secure to the defeated party the right to raise the question here if the State Court denied the petition for rehearing without opinion.

We cannot assume that Congress attempted to give to this Court appellate jurisdiction beyond the judicial power accorded to the United States by the constitution. The mere reversal by a State Court of its previous decision, as in this case before us, does not, as we have seen, violate any clause of the Federal Constitution. Plaintiffs' claim therefore does not raise a substantial Federal question. This has been decided in so many cases that it becomes our duty to dismiss the writ of error for want of jurisdiction."

Ibid.

"In *Tidal Oil Co. vs Flanagan*, decided Jan. 7, 1924, we had occasion to consider the same issue. After a somewhat full examination, we held that, by a score of decisions of this Court, a judicial impairment of a contract obligation was not within Sec. 10, Article 1, of the Constitution, since the inhibition was directed only against impairment by legislation, and that such judicial action presented no Federal question of which this Court would



take jurisdiction on a writ of error from a State Court."

Fleming et al. vs Fleming, 264 U. S. 29, 31.

"The question whether or not a State statute conflicts with the Constitution of the State is settled by the decision of its highest Court. Carstairs vs Cochran, 193 U. S. 10, 16. This Court 'is without authority to review and revise the construction affixed to a State statute as to a State matter by the Court of last resort of the State.' Quong Ham Wah Co. vs Industrial Acc. Commission, 255 U. S. 448, and cases cited."

Terrace et al vs Thompson, 263 U. S. 187, 224.

"The Act, it is true, as recognized by the Supreme Court of Georgia in the instant case, does not require the board of assessors to give any notice to the tax payer, or grant him a hearing, before assessing the value of the property. Turner vs Wade, Supra, p. 70. It does not, however, make this assessment by the board final and conclusive against the tax payer. \* \* \* \* \* The construction of the Act by the highest Court of the State is to be accepted by this Court. Farncomb vs Denver, 252 U. S. 7, 10."

McGregor vs Hogan, 263 U. S. 234, 236.

Whether a contract was a valid one under the laws of a State belongs to the Supreme Court of the State to decide.

City of Opelika vs Opelika Sewer Co., 265 U. S. 215.

“We are asked to go into the proper construction of the State statute and its validity under the State Constitution. But these are questions of local law, the decision of which by the Supreme Court of the State is controlling.”

Des Moines Nat. Bank vs Fairwether, and authorities cited, 263 U. S. 103, 105.

Also, Puget Sound Power Co. vs County of King, 263 U. S. 22, 27.

“Under the settled rule of this Court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest Court of the State, fixing the meaning of the state legislation as though such meaning had been specifically expressed therein. See, for example, *Leffingwell vs Warren*, 2 Black. 599, 603; *Green vs Neal*, 6 Pet. 291, 297-300. And we follow the State construction even though it may not agree with our own opinion. *Carroll County vs United States*, 18 Wall 71, 82; *Shelby vs Guy*, 11 Wheat. 361, 367; *Tioga R. Co. vs Blossburg & C. R. Co.* 20 Wall 137, 143.”

*Knights of Pythias vs Meyer*, 265 U. S. 30.

Legislative not judicial action, is what is forbidden by

the prohibition in United States Constitution, Art. 1, Sec. 10, against impairing obligation of contracts.

McCoy vs Union Ele. R. Co. 247 U. S. 354.

Whether a State statute did or did not validate a contract theretofore unenforceable is a question for the State courts to decide, and their decision is not subject to review in the Federal Supreme Court.

Munday vs Wisconsin Trust Co. 252 U. S. 499.

The contract clause of the Federal Constitution applies only to legislation subsequent in time to the contract alleged to have been impaired.

Ibid.

The contract clause of the Federal Constitution cannot be invoked against a change of decision by a State court.

National & Assn. vs Braham, 193 U. S. 635.

“Where the Federal question upon which the jurisdiction of this Court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the Constitution, so as to give this Court jurisdiction on writ of error to a State court, by some subsequent statute of the State which has been upheld or effect given to it by the State Court.”

Bacon vs Texas, 163 U. S. 207.

A purchaser of county bonds issued in aid of a railroad, under the supposed authority of the Act incorporating the road, which is subsequently held unconstitutional by the State courts because the provisions for the transfer to the railroad company of municipal subscriptions in and of another railroad were not within its title, has no contract rights protected by the Federal Constitution against impairment because the purchase was made on the faith of prior decisions that municipal subscriptions to railroad stock were so germane to railroad incorporation as not to require specific mention in the title of an Act providing for the incorporation of a railroad.

Zane vs County of Hamilton, 189 U. S. 370.

Denial by a city in an ordinance, of its obligation to make payments under a contract and declaration in such ordinance that it would not make such payments in the future do not fall within the inhibition of the Federal Constitution against impairment of the obligation of contracts.

St. Paul Gas Light Co. vs City of St. Paul, 181 U. S. 142, 149.

“We are not authorized by the judiciary Act to review the judgments of the State courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a State could be brought here where the party setting up a contract alleged that

the court had taken a different view of its obligation to that which he held."

Knox vs Exchange Bank, 79 U. S. 379, 383.

To similar effect:

Lehigh Water Co. vs Easton, 121 U. S. 388, 392.  
"It is the peculiar province and privilege of the State courts to construe their own statutes; and it is no part of the functions of this Court to review their decisions, or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary."

Commercial Bank vs Buckingham, 46 U. S. 317, 343.

"As this Court has repeatedly ruled, the Constitution affords no protection as against an impairment by judicial decision."

"But although the State Court may have construed the contract and placed its decision upon its own construction, if it appear upon examination that in real substance and effect force has been given to the statute complained of our jurisdiction attaches."

Columbia Railway, Gas & Electric Co. vs South Carolina, 261 U. S. 236.

The decision in this last cited case is that mainly relied upon by the telegraph company, the latter asserting that such effect has been given to the Georgia acts of 1915 and 1916, by the rulings of the Georgia Courts as to bring its alleged contracts of 1852 and 1870 within the Constitutional protection. But the instant case differs widely from that of the Columbia & Company vs South Carolina, Supra. In the latter case the Act there in question (Act of 1917) expressly declared that the terms of the particular contract involved had not been complied with, that by reason thereof the rights and interest of the defendant had been forfeited and reverted to the State and the Attorney General and other officers were directed to make re-entry within a certain time. The courts of South Carolina gave effect to this Act, not simply as one authorizing a judicial proceeding, but held that, coupled with a demand and refusal, it was *equivalent to the exercise of the right of re-entry*, that the declaration in the Act that there had been a failure to perform the conditions of the contract was entitled to some respect, though the court was not thereby prevented from inquiring whether such declaration was true; and held, further, that the Act was binding upon the Court under the evidence. In the instant case force has not been given, in real substance and effect to the Acts of 1915 and 1916, and those Acts in no way impair the obligation of any contract. Nothing more was done by the Georgia Court as to said Acts, than to recognize the plaintiffs below as proper parties plaintiff to assert whatever rights the State of Georgia, or its lessee, might have to the possession of the right of way.

The decisions in *Mayor or &c, of Savannah vs State*, 4 Ga. 26, *Supra*, and *Martin vs Broach*, 6 Ga. 21, 27 *Supra*, are both decisions of the Supreme Court of Georgia made before the passage of the Act of 1852 to charter the Augusta, Atlanta & Nashville Magnetic Telegraph Company.

How then can it be said that the obligation of the contract has been impaired by a change of construction of the Georgia constitution of 1798 from that prevailing when the Act of 1852 was passed?

Will the Supreme Court of the United States, should it happen to differ from the Supreme Court of Georgia, say that an Act of the Legislature of Georgia was in accordance with the Georgia constitution when the Supreme Court of Georgia has said that it was not, and hence reverse the decision of the State Supreme Court?

The decision attacked was that of the Supreme Court of Georgia. It was made by three Justices of that Court affirming the decision of the Judge of the Superior Court. The Judge who rendered the contrary opinion, holding the Act constitutional, was himself a Judge of the Superior Court, and his view was concurred in by only two of the Supreme Court Justices.

The two decisions above cited constituted a plain and solemn warning that acts of the Legislature must conform to the constitution and must, by their title, indicate what were their contents. We insist, if it be a matter which the Supreme Court of the United States will un-

dertake to pass upon, that the title of an act being merely to incorporate a certain company, said title does not indicate that the act contains a ratification of a contract made two years before between an engineer of the State's railroad and promoters of the corporation, granting an important easement out of the right of way of that railroad, claimed to be a perpetual and assignable easement; nor does such title indicate that the act contains a grant to the corporation of such easement coupled with participation by an officer of the State in the management of the affairs of the corporation and the taking of stock in the corporation by the State, substituting dividends or anticipate dividends for interest on money due the State.

Among the cases referred to and considered in *Mayor &c vs Hughes*, 110 Ga. 795 were those of *Mayor of Savannah vs Commissioners*, 4 Ga. 26, 38, *supra*, and *Prothro vs Orr*, 12 Ga. 36, *supra*, and *Martin vs Broach*, 6 Ga. 21, *supra*, in which it was said that "Where the title specifies some of the objects for which the statute was passed and contains this general clause—'and for other purposes therein contained' portions of the Act not specially indicated in the title, are, nevertheless, good, under this general clause."

To similar effect *Black et al vs Cohen*, 52 Ga. 621, 626.

In *Butner vs Boifeuillet*, 100 Ga. 752 it was said:

"Different opinions may prevail elsewhere as to the value of these words as descriptive terms in



the title of an Act of the General Assembly; they have in this State a fixed legal significance, and the courts in passing upon the constitutionality of the Acts of the General Assembly are not authorized to disregard it. \* \* \* \* There has been no substantial departure from this construction of the constitutional provision in question and it was distinctly recognized and reaffirmed in the case of *Black vs Cohen*, 52 Ga. 621 as well as in numerous other cases which it is not necessary here to cite."

As to the use of these words it was said in the opinion in *Martin vs Broach*, 6 Ga. 21, *supra*, "This was sufficient to prevent surprise—to induce the members, either to call for the reading of the *whole* of the bill, or to look into it, during its progress through the legislature."

In *Bass vs Lawrence*, 124 Ga. 76, *supra*, it was said: "If the words 'and for other purposes,' had been omitted, the matter in the body of the Act would be limited by the caption; the whole of the Act would not be void, but that portion of the body of the Act to which no reference was made in the title would fail."

This decision was made after that in *Bonner vs Milledgeville Ry. Co.*, 123 Ga. 115, cited for plaintiff in error, and was based on earlier unanimous decisions of the Supreme Court of Georgia.

And in the *Bonner* case, though the holding seems to go far, the title of the Act did contain the saving words "and for other purposes," which words were not in the

title of the Act of 1852 to incorporate the Augusta, Atlanta & Nashville Magnetic Telegraph Company.

Certainly it can be said, as was said in *Bucher vs Cheshire R. R. Co.*, 125 U. S. 555, that the decisions on this subject by the Georgia Court are numerous enough and of sufficiently long standing to establish the rule as the law of that State on the subject.

The decision of this Court in *Wade vs Travis County*, 174 U. S. 499, 508 is not applicable here since there has been no later case in Georgia overruling the earlier decisions, and, according to the law of that State, the earlier decisions, when not overruled, have the force of law.

And *Muhlker vs New York & Harlem R. R. Co.*, 187 U. S. 544, is obviously not applicable since no rights of Garst & Bean or of the Augusta, Atlanta & Nashville Magnetic Telegraph Company were obtained because of or based upon prior decisions of the Supreme Court of Georgia. We invite attention to the fact that the decision in the case last cited was concurred in by Mr. Justice Brown only as to the result, and to the dissenting opinion of Mr. Justice Holmes, concurred in by the Chief Justice, Mr. Justice White, and Mr. Justice Peckham.

In *Stearns vs Minnesota*, 179 U. S. 223, it is said: "This court has always held that the competency of a State through its legislation to make an alleged contract and the meaning and validity of such contract, are matters which in discharging its duty under the Federal constitution it must determine for itself."

Mr. Justice Brown concurred in the decision in that case upon the ground "that the legality of commuting the payment of taxes upon railway property by a payment of a percentage upon the gross earnings, having been recognized by the legislature and the Supreme Court of Minnesota for thirty years, and also having been recognized as valid in the constitutional amendment of 1871, it is too late to set up its repugnance to the State constitution as against railways which were built upon the faith of its validity."

In the dissenting opinion of Mr. Justice White, concurred in by three other Justices, it was said: "It follows then, that if the gross receipt tax was an exemption it was void, because repugnant to the constitution of the State. If so void, it did not create a contract, within the contract clause of the constitution of the United States, for rights protected from impairment could not flow from an Act which had no legal existence."

---

AS TO GEORGIA DECISIONS CITED FOR PLAINTIFF IN ERROR ON THE CONSTITUTIONALITY OF THE ACT OF 1852.

In *Hope vs Mayor &c of Gainesville*, 72 Ga. 646, the title of the Act contained the words "and for other purposes." The same is true in *Bonner vs Milledgeville*, 123 Ga. 115. Also in *Plumb vs Christie*, 103 Ga. 700, though not appearing in the report. In *Wellborn vs State*, 114 Ga. 793 the title of the Act contained the words "and for other purposes," and this is expressly referred to as

authority for the decision (pps. 815, 817) under the ruling in *Mayor vs Hughes*, 110 Ga. 795, *Supra*.

In *Churchill vs Walker*, 68 Ga. 681, the title contained the words "and for other purposes." The same is true as to *Peed vs McCrory*, 94 Ga. 487, *Black vs Cohen*, 52 Ga. 621, *Forkas vs Smith*, 147 Ga. 503 and *Lloyd vs Richardson*, 158 Ga. 633.

Not one of these cases was decided before 1852.

In the case mainly relied upon, *Goldsmith vs Rome R. Co.*, 62 Ga. 478-9, it is expressly said:

"In the cases before our Supreme Court in which they have held statutes to be unconstitutional because they contained 'matter different from what was expressed in the title' the court has also held that if the title of the Acts had been general, or if the title, after designating a particular object, had added 'and for other purposes' the construction would have been different."

As to the second of these alleged contracts, to wit the contract of 1870, made by Blodgett, Superintendent of the Western & Atlantic Railroad, (with the approval of Bullock, Governor), with the Western Union Telegraph Company, what has been above said as to the Garst and Bean contract is applicable.

There being no power in Blodgett, Superintendent, either with or without the approval of the Governor, to

bind the State by such a contract, without express legislative authority or ratification, and no such legislative authority or ratification having been granted or made, there was no contract.

## II.

### CLAIMS MADE BY DEFENDANT IN ERROR UNDER A GENERAL STATUTE OF THE STATE OF GEORGIA OF DEC. 29TH, 1847

On Dec. 29, 1847 the General Assembly of Georgia passed an Act with the following title:

“An Act to Authorize the Construction of the Magnetic Telegraph and Providing for the Protection of the Same.”

This Act was as follows:

“Whereas, many of the citizens of the State of Georgia are interested in the construction of lines of the Magnetic Telegraph, and desire the protection of their property, and the privilege of using the public roads and highways for their posts and wires.”

“Sec. 1. Be it enacted, That any company or individual may erect posts and wires, and other fixtures for telegraphic purposes, on or by the side of any public road or highway in this State: Provided that such posts, wires or fixtures shall in no

case be so set or placed as to obstruct, hinder, or in any way interfere with the common uses or business of said roads or highways."

Record p. 36.

It is claimed by defendant in error that this Act was a grant of easements for telegraph lines by the State of Georgia, and that, in some way, not made clear, the decision of the Supreme Court of Georgia, impaired the obligation of a contract arising out of this grant.

It is evident that neither the Western Union Telegraph Company nor any of its predecessors constructed any line of telegraph on the right of way of the Western & Atlantic Railroad under or because of this Act. No such claim was made in the Court below.

The Act itself contains no reference to the right of way of any railroad and was evidently meant to refer to "public roads" according to the ordinary interpretation of those words.

Of course this statute did not mean that a company or an individual could enter upon the right of way of the railroads in Georgia and appropriate it or any part of it without consent and compensation. Such a statute would have been unconstitutional. In fact a later statute, that of Aug. 26, 1872, was declared unconstitutional by the Supreme Court of Georgia because it provided for condemnation of railroad rights of way for telegraph lines, without providing means of enforcing the award or for an appeal from the award of arbitrators.

“The Act of the General Assembly of Georgia, approved August 26th, 1872, entitled ‘An Act to empower and authorize telegraph companies in this State to construct their lines upon the right of way of the several railroads in this State, is unconstitutional and void, for the reason that it fails to provide any compulsory process for the enforcement of the payment of just compensation for private property taken under its provisions.’”

South Western R. R. Co. vs S. & A. Tel Co. 46 Ga. 43.

The State of Alabama had a statute in which was used language similar to that of the Georgia Act of Dec. 29, 1847, and in that State the Western Union Telegraph Co. made claims under it similar to the claim it makes in the instant case.

As to such claims the Supreme Court of Alabama held:

“As the ultimate owner of the beneficiary interests in the public roads of the State, the legislature doubtless had the power to make such a grant as to the margin of public roads; but as the right of way of a railroad is private property no such power would seem to exist, for it would infringe upon the constitutional provisions. The location of said Section 5817 in the Code, and its terms granting an unconditional and free right to use the margins of public highways, tend clearly to show that by ‘public highways’ is meant public roads. We are of

the opinion that the language of that statute has no application to the right of way of a railroad. While railroads are denominated public highways, yet they are such in a more or less limited sense, such as to be within State and Federal control; but are not public highways in the general sense, such as would permit their use by the public, as in the case of public roads."

Citing and quoting from *Western Un. Tel. Co. vs P. R. R.* 195 U. S. 573.

*L. & N. R. R. Co. vs Western Union Tel. Co.* 195 Ala. 124.

### III.

#### TITLE, RIGHT, PRIVILEGE OR IMMUNITY CLAIMED UNDER THE CONSTITUTION OR STATUTE OF THE UNITED STATES NOT DENIED.

In a very general and sweeping assignment of error (pps. 55-69 of the record) the plaintiff in error apparently undertakes to cover all the defenses made by it in the Court below, as though none of them had been finally settled and disposed of in that court.

Many of the questions sought to be made by the mass of verbiage employed have been already herein considered.

Again, as to the Act of 1915 for the lease of the Western & Atlantic Railroad, and the Act of 1916 amendatory



thereof and the resolution of the Western & Atlantic Railroad Commission, permit us to say :

Surely the plaintiff in error will not contend that its alleged right to put or maintain its poles and wires on the railroad right of way could prevent the State from releasing its railroad, or from enacting a law authorizing its officers to seek the judgment of a proper court on the subject of the alleged rights of the plaintiff in error.

If the Acts or resolution had themselves repudiated contracts made by the State with the telegraph company, or its predecessors in title, or if the Western & Atlantic Railroad Commission had so construed the Act, or undertaken to oust the Telegraph Company under color of the Act, and without giving it an opportunity to be heard, the question might have arisen that by such action the obligation of some valid contract, if there were any, was impaired.

But no such construction was given to the Act or resolution. They were not treated as self-operating ousters of the Telegraph Company, nor did the lower court hold that they were.

The Telegraph Company was not denied the right to be heard and it has been fully heard. The resolution of the Commission amounted simply to the statement that, in the opinion of that body, such a state of facts existed as to justify the institution of a suit to determine the relative rights of the State and the Telegraph Company.

On page 67 of the record appears the claim that the resolution of the Western & Atlantic Railroad Commission was without notice to the Telegraph Company or service upon it of any process calling upon it to be present at any hearing of the Commission, and that no provision was made for it to be heard before the Commission. No such claim was made in the court below.

As well might it be said that a person against whom an indictment was sought from a grand jury had a constitutional right to appear before that body and be heard upon the question as to whether an indictment ought to be returned.

No final action or action of any kind was taken by the Commission, except to authorize institution of legal proceedings, in which could be determined whether the Telegraph Company had the right to continue to occupy the railroad right of way.

#### IV.

#### GRANTS FROM THE STATE OF GEORGIA

These alleged grants have been already hereinbefore considered. On page 56 of the record it is asserted that the alleged contract of August 18, 1870, between Blodgett, Superintendent of the Western & Atlantic Railroad (with the approval of Bullock, Governor) and the Western Union Telegraph Company, was sustained by this court in the case of Western Union Telegraph Company vs Western & Atlantic Railroad Company, 91 U. S. 283.

In dealing with this assertion possible confusion may be avoided by keeping in mind the various persons and corporations who have had possession of the railroad.

The railroad was operated by the State of Georgia, under the name of the "Western & Atlantic Railroad," through its officers and agents from the time it was built until, under the Act of October 24, 1870, it was leased for a term of twenty years beginning December 27, 1870, to a corporation known as the "Western & Atlantic Railroad Company." Just prior to this lease the alleged contract of 1870 with the Western Union Telegraph Company was made.

In the case of Western Union Telegraph Company vs Western & Atlantic Railroad Company, 91 U. S. 283, the State of Georgia was in no sense a party. The litigation there was wholly between the Telegraph Company and said lessee.

That suit was a controversy over the ownership of a *particular line of wire*, which the lessee claimed it owned, or had the right to use, under its lease, and the ownership of which, with the right to exact certain payments therefor, was claimed by the Telegraph Company.

This court expressly refused to decide the contention, made by the lessee, that the contract was void, because the Superintendent and the Governor had no power to make it.

After the expiration of the lease of 1870 to the "West-

ern & Atlantic Railroad Company," there came into effect the lease of the railroad made by the State to the Nashville, Chattanooga & St. Louis Railway. Under the terms of the Act providing for this lease the lessee became a body corporate under the name of "Western & Atlantic Railroad Company," a corporation with the same name as that of the first lessee, but an entirely different and distinct entity.

When this second lessee took possession under its lease, to-wit December 27, 1890, there went into effect as to the use and occupation of the right of way by the Telegraph Company, the contract of June, 1884, between the Nashville, Chattanooga & St. Louis Railway and the Telegraph Company.

The alleged contract of August 18, 1870, became inapplicable, and *functus officio*. The Telegraph Company, itself, asserted in the judicial proceedings herein before stated, that "*its right to occupy*" the right of way depended upon the contract of 1884 and that it was necessary for it to "*acquire*" the right of way by condemnation having itself terminated the contract of 1884.

When the second lease expired there came into effect the lease to the Nashville, Chattanooga & St. Louis Railway made under the Act of November 30, 1915, as amended by the Act of August 4, 1916, possession of the railroad passing to said lessee on December 27, 1919.

Under the terms of the lease Act the lessee became in the operation of the railroad, a corporation under the

name of "Western & Atlantic Railroad." So it will be seen that from December 27, 1870 to December 27, 1890, the road was operated, under lease, by the "Western & Atlantic Railroad Company;" from December 27, 1890, to December 27, 1919, under the second lease, by the "Western & Atlantic Railroad Company," a corporation with the same name as but distinct from the first lessee; and that from December 27, 1919, the railroad has been operated, under the third lease, by the Nashville, Chattanooga & St. Louis Railway, lessee, under the corporate name, "Western & Atlantic Railroad."

While the "Western & Atlantic Railroad Company," the second lessee, was operating the railroad, the contract of June 1884, under which the Telegraph Company had from 1890 been on the right of way, was ended by the voluntary act of the Telegraph Company in giving notice, under its provisions, that it would not be of force after August 17th, 1912.

Thereafter in January, 1912, the Telegraph Company notified the "Western & Atlantic Railroad Company," (the corporate name under the second lease), that it "proposes and intends to *acquire* from you by condemnation \* \* \* a right of way \* \* \*". The location of the right of way sought to be acquired being the same as that upon which already were the posts and wires of the Telegraph Company; it afterward gave a similar notice to the State of Georgia, and, in its appeal to the court to speed the hearing of the suit for injunction, it asserted: "Defendant is now occupying with its line of telegraph a right of way

on the railroad right of way of said petitioner, under a contract which will expire August 17th, 1912." (The contract of June 1884).

Record pps. 255-257, 262.

It must be evident that the Telegraph Company, itself, placed no reliance upon the alleged Garst & Bean contract, the Act of 1852 and the alleged contract of 1870, and has now asserted rights under them because having found that it could not condemn the right of way, after having itself put an end to the contract of 1884 under which it was "occupying" the same, it has resorted to claims springing from "unconsidered trifles" gathered together by it and its predecessors in years past and buried in its archives.

## V.

### CLAIM OF PERPETUAL RIGHT OF WAY

The Georgia Statute of December 22, 1843 (Record p. 207) did not authorize the Chief Engineer, with the approval of the Governor, to make the Garst & Bean contract. It made it the duty of the Chief Engineer, under the direction of the Governor, "to progress gradually in the completion of the said W. & A. R. R. with the existing appropriation."

In 1850 the Chief Engineer was not acting under the last mentioned statute. That statute had been modified by Act of December 23, 1847, December 30, 1847 (Record p. 209), and by Act of February 23, 1850 (Record p. 210),

the Governor was expressly forbidden to sell "at any time any part of the right of way."

The use of the telegraph for railroad purposes was unknown in Georgia in 1843 and it was not until December 29, 1847, that construction of telegraph lines in Georgia was authorized at all.

If the contract with Garst & Bean was ratified by the Act of 1852 incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company and the latter Act was constitutional, was the grant one of a perpetual, assignable, unconditional easement?

The grant, under the Act of 1852, was to a named corporation. It contained no words of assignability or perpetuity. It appears, taken in connection with the Mitchell Report, to have been of the privilege of stringing wires on poles furnished and erected by the railroad. Such construction is not of the permanent character of construction of a railroad, (*State of Georgia vs Cin. So. Ry. Co.*, 248 U. S. 26). Nor of a telegraph company operating in a city with poles, wires and house connections, and with privileges of tearing up streets and putting its wires under them in conduits, where the plant and property was "useless when dissevered from the streets," (*Louisville vs Cumberland &c Co.*, 224 U. S. 663-4; *Owensboro vs Cumberland Tel. Co.*, 230 U. S. 58; *Essex vs New England Tel. Co.*, 239 U. S. 321).

The easement claimed by the Telegraph Company in the instant case is of the highest character, perpetual, ir-

revocable and assignable. In other words, the right to forever occupy the railroad right of way, in no defined location, without right, on the part of the State, to recall or put an end to the privilege, and with the right in the Telegraph Company to assign this perpetual, irrevocable easement to any one it saw fit. The Western Union Telegraph Company claims to have acquired a right freed of any obligation, and when enforcement of the obligation has become impossible. Such a right, as against the State, must appear to have been explicitly granted. The Garst & Bean contract does not explicitly do so, nor does the Act of 1852.

Can it be said that a perpetual right is granted without reference to any corresponding obligation on the part of the Telegraph Company?

Clearly, if there was a grant, it was a grant to a particular corporation in the management of which and in dividends from which the State was to participate. How was that right of participation in management and in dividends to be preserved, if the easement could be assigned to others? How was it preserved in the assignment claimed to have been made.

“Contract rights coupled with liabilities, or involving a relation of personal confidence between the parties, can not be transferred to a third person by one of the parties to the contract without the assent of the other.”

Tifton, Thomasville & Gulf Ry Co. vs Bedgood and Co., 116 Ga. 945.



“Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.”

Pollock, Cont. 4th ed. 425, quoted with approved by Mr. Justice Gray in *Arkansas Valley Smelting Co. vs Belden Mining Co.*, 127 U. S. 379.

See, also, to same effect:

*Delaware County vs Diebold Safe & Lock Co.*,  
133 U. S. 473.

*Burek vs Taylor*, 152 U. S. 634, 651.

5 Cor. Ju. 878-882.

*Pike vs Waltham*, 168 Mass. 581.

*New York Bank Note Co. vs Kidder Press Mfg. Co.*, 192 Mass. 405.

*Schlessinger vs Forest Product Co.*, 78 N. J. L. 642.

*Colton vs Raymond*, 114 Fed. 869.

*Morris & Co. vs Central R. Co.*, 19 N. J. Eq. 372.

But in the instant case there was no assignment of the Garst & Bean contract or of the grant, if there was a

grant, to the Augusta, Atlanta & Nashville Magnetic Telegraph Company.

The history of that company as revealed in the record is that within a few years after the grant of the charter it became insolvent, that whatever it had went out of it not by assignment or transfer made by it, and that Hammett acquired from it, by sale under a comon law execution against it, only certain of its property in Richmond County and DeKalb County, Georgia, in neither of which is located any part of the right of way in question, both of which are later in date than the deed of Hammett to Morris et al on which the plaintiff in error relies.

In other words the record shows nothing as to how Hammett or any other person acquired, either by contract or judicial sale, any right which the Augusta, Atlanta & Nashville Magnetic Telegraph Company had or had had in the right of way. (Record pps, 145, 146, 177). There is not in ~~the~~ record any trace of a conveyance to Hammett or Wylly, or any other person of any telegraph line on the Western & Atlantic Railroad from the Atlanta, Augusta & Nashville Magnetic Telegraph Company, or of any sheriff, marshal or other official. There is no evidence that Hammett or Wyley ever had any title.

“Grants of franchises and special privileges are always to be construed most strongly against the donee, and in favor of the public.”

St. Clair County Turnp. Co. vs Illinois, 96 U. S. 63, 68.

“The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication.”

Coosaw Min. Co. vs South Carolina, 144 U. S. 550, 562.

Knoxville Water Co. vs Mayor &c of Knoxville, 200 U. S. 22-34.

Since special privileges are to be strictly construed, no franchise which is granted by the State is ever construed to be perpetual, whether it is in the nature of a contract or otherwise, unless it is so declared in clear terms or by necessary implication.

Birmingham &c Street R. Co. vs Birmingham Street R. Co., 79 Ala. 465.

Blair vs Chicago, 201 U. S. 400, 463.

## VI.

### LICENSES ACCOMPANIED BY EXPENDITURES

Under the decisions of the courts above mentioned there can be no such thing as obtaining a license or easement by parol upon the right of way of the Western &

Atlantic Railroad; nor would a written grant be converted from what it was meant to be into something else because the grantee may have expended money upon or about it. Such a grantee from the State takes his grant, if it would otherwise not be assignable or perpetual, charged with knowledge that it cannot be made so because he may spend money in making or attempting to make a profit out of it.

“Presumably any right conferred by such a contract on the Telegraph Company to use or occupy railroad property was given only to promote the purposes of the contract, and was intended to last only so long as the relations between the parties established by the contract existed.”

Western Un. Tel. Co. vs L. & N. R. R. Co., 238 Fed. 34.

It is said on behalf of plaintiff in error:

“It is certain that the Governor of Georgia approved that contract because the ratifying Act of January 27, 1852, was approved by the Governor of Georgia January 27th, 1852.” This seems a *non sequitur*.

## VII.

### BINDING EFFECT OF DECISION OF SUPREME COURT OF GEORGIA.

The decision of the Supreme Court of Georgia affirmed the judgment of the lower court. This is true though

the Justices presiding were equally divided in number as to whether the judgment should be affirmed or reversed.

There is no rule of construction binding on this court arising from the contention that decisions in earlier cases in the Supreme Court of Georgia were in conflict with the opinion affirming the judgment in the instant case.

None of the decisions of the Supreme Court of Georgia urged by plaintiff in error, upon the question of the constitutionality of an Act, were made prior to the passage of the Act of 1852 incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company, so that *Geleke vs Dubuque*, 1 Wall. 205, 206 and similar decisions of this court are not applicable. No rights of the Telegraph Company or of its predecessors accrued under such earlier decision. On the contrary, as we have shown above, the earlier decisions of the Supreme Court of Georgia, as well as later ones, are in accord with the decision in the instant case.

We do not understand that decisions of this court relied upon by plaintiff in error are in conflict with the decision of the Supreme Court of Georgia in the instant case.

In *Inhabitants of Montclair vs Ramsdell*, 107 U. S. 147, an Act of April 9th, 1868 had been passed authorizing certain townships to issue bonds in aid of a railroad. This was expressly indicated and declared in its title. In this Act the Township of Bloomfield was excepted from the operations of the Act. Later, in the same year,

an Act was passed with the title: "An Act to set off from the Township of Bloomfield, in the County of Essex, a new township, to be called the Township of Montclair." In the latter Act was a provision that provisions of Acts from which Bloomfield had been specially excepted in prior Acts, should apply to the Township of Montclair. This court held that the later Act did not offend against the provision of the constitution of New Jersey that "every law shall embrace but one object, and that shall be expressed in its title."

This court said it should be assumed that the legislature which passed the Act of April 9th, 1868 was aware when it passed another Act April 15th, 1868, six days later, of the fact that the earlier Act had expressly excepted the Township of Bloomfield from all of its provisions; and that the provision of the later Act, taking the Township of Montclair from without the exceptions of the former, was sufficiently indicated by the title of the later Act.

It is to be noted that this court did not differ from the decisions of the Supreme Court of New Jersey, but affirmed the decision of the Circuit Court of the United States, which had allowed recovery on the bonds issued by the Township of Montclair.

Attention was given by this court to the decision of the Supreme Court of New Jersey in *Rader vs Township of Union*, 39 N. J. L. 509, in which Chief Justice Beasley observed that the purpose of the constitutional provision was: "First, to secure a separate consideration for

every subject presented for legislative action; second, to insure a conspicuous declaration of such purpose;" and it was observed that the principle so announced did not conflict with the conclusion reached by this court.

The decision of this court in *Detroit vs Detroit & R. Co.*, 184 U. S. 368, was based mainly upon that in the *Montclair* case, *supra*, and upon a decision of the Supreme Court of Michigan; and the decision of the United States Circuit Court for the Eastern District of Michigan was affirmed.

*Blair et al vs Chicago*, 201 U. S. 400 *Supra*, came up from an United States Circuit Court of Illinois, and was based mainly upon the *Montclair* case, *supra*, the *Detroit* case, *supra*, and upon the decision of the Supreme Court of Illinois, in *People vs People's Gas & Co.*, 205 Ill. 482 in which the Illinois cases were reviewed. This court held that certain Illinois Acts were not obnoxious to the Constitution of Illinois, although their titles were quite broad and general, as the titles did not cover legislation "incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection," the constitutional provision being merely that no law should embrace more than one subject, which should be expressed in its title.

## VIII.

### COLLATERAL INTERPRETATION

The practice of various executive departments of the

government, as a means of collateral interpretation, cannot determine whether the title to an Act is sufficiently broad to cover the provisions of the Act.

No reason therefor is indicated in *Howell vs State*, 71 Ga. 224, nor in *Wellborn vs Estes*, 70 Ga. 390, relied upon by plaintiff in error.

Practice of executive departments cannot convert an unconstitutional into a constitutional Act.

Upon a question merely of interpretation of language the practice of departments may be entitled to some weight, but it should be, as said by Judge Story in 1 Story Com. Const. Sec. 408, "the practical exposition of the government itself, in its various departments, upon particular questions discussed and settled upon their single merits. These approach the nearest in their own nature to judicial expositions, and have the same general recommendation that belongs to the latter. They are decided upon solemn argument *pro re nata*, upon a doubt raised, upon a *lis mota*, and a deep sense of their importance and difficulty, in the face of the nation, with a view to present action in the midst of jealous interests, and by men capable of urging or repelling the grounds of argument, from their exquisite genius, their comprehensive learning, or their deep meditations upon the absorbing topic."

In the instant case none of the elements for giving weight to collateral interpretation, exist.



Indeed, it is doubtful if any one in Georgia was aware of any claim by the Western Union Telegraph Company under the Garst & Bean contract and the Act of 1852, until shortly before the filing of the answer in the instant case.

No such claim was made when the Telegraph Company undertook to condemn the right of way and asserted that it was necessary for it to "acquire" the same by condemnation, nor in the litigation which thereupon ensued, in which it alleged that it occupied the right of way under the contract of 1884.

Its own Vice President, G. W. E. Atkins, did not know even of the existence of the documents until about 1902. (Record p. 290). Its own attorney did not know of such a claim when he instituted the condemnation proceedings. (Record p. 296, 297). Nor did its Vice President, Atkins. (Record p. 298, 299).

In *U. S. vs B. & O. R. R. Co.*, 1 Hughes, 138, the question was not as to any constitutional provision, but was as to whether a contract was limited in time or perpetual in its nature. The Secretary of War had the *power to make the contract*, and the contract made by him "was perpetual in its purport."

This decision was by a District Judge and does not appear to have been appealed from.

There is no question in the instant case as to doubtful construction of a statutory provision, where the settled

practice of a government department will be given weight, as was the case in

U. S. vs Philbrick, 120 U. S. 52.

U. S. vs Alabama Gt. So. R. R., 142 U. S. 615.

U. S. vs Johnson, 124 U. S. 253.

Roberts vs Downing, 127 U. S. 607.

U. S. vs Hermonos, 209 U. S. 337.

Johnson vs Towsley, 13 Wall. 72.

## IX.

### TRANSMISSION OF TITLE OF GARST & BEAN AND OF AUGUSTA, ATLANTA & NASHVILLE MAGNETIC TELEGRAPH COMPANY

Of course if Garst & Bean and the Telegraph Company had no title they could transmit none.

But assuming that they had, no legal transmission of title was shown or pleaded.

Herein before attention has been called to the fact that no assignment or conveyance of title to any interest in the right of way, by the Augusta, Atlanta & Nashville Magnetic Telegraph Company was shown or pleaded, and that no conveyance of any such interest was shown to have been made under any judicial sale of any such interest.

The case is not one for presumption of a grant unless a grant from the State is to be presumed from the as-

sertion of long possession; in other words, unless the well established rule that prescription would not run against the State and laches not be imputed to it be departed from.

There is no such thing as presumption of a grant as against the State, as to the right of way of the Western & Atlantic Railroad, since a grant of any part of that right of way could not be save by Act of the General Assembly, and the right could not be acquired by prescription or laches. The very basis for the presumption is lacking.

“The State can only be estopped from asserting her right to her own property by legislative enactment or resolution.”

Alexander vs State of Georgia, 56 Ga. 478.

State of Georgia vs Paxson & Cannon, 119 Ga. 130.

“No prescription runs against the State; and this is true as to the State’s title to the Western & Atlantic Railroad as well as the balance of the public domain, and it does not matter whether the road was for the time being in the hands of the State’s officer, or of her tenants or lessees.”

Glaze vs Western & Atlantic Railroad Company, 67 Ga. 761.

Kirschner vs Western & Atlantic Railroad Company, 67 Ga. 760.

To the same effect,

Vickers vs Benson, 26 Ga. 590.

State vs Paxson & Cannon, *Supra*.

Dean vs Feely, 69 Ga. 813.

Herndon vs Strickland, 86 Ga. 323.

Norrell vs Augusta Ry. Co., 116 Ga. 313.

Langley vs Augusta, 118 Ga. 590.

Wade vs Cornelia, 136 Ga. 89.

As to claims of easement by prescription see also :

19 Cor. Ju. 876, 889, 897, 901.

On statute of limitations as against the State, see :  
Monographic Note, 76 Am. St. Rep. 469, 488, 492-4.

“It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in it as a sovereign government, is not bound by any statute of limitations, unless Congress has clearly manifested its intention that it should be so bound.”

U. S. vs N. C. & St. L. Ry., 118 U. S. 120, 125.

See, also,

U. S. vs Thompson, 98 U. S. 486.  
U. S. vs Insley, 130 U. S. 265.  
U. S. vs Bell Telephone Co., 159 U. S. 554.  
Same vs Same, 167 U. S. 265.  
Virginia vs West Virginia, 220 U. S. 34.  
C. & D. Canal Co. vs U. S., 250 U. S. 123.

“Possession is never adverse to the State, and cannot, no matter how long continued, or in what good faith made, ripen into a title.”

Williamson vs Matthews, 32 Ga. 524, 528.

“Estoppels against the State are not favored; and though they may arise from its express grants they cannot arise from the laches of its agents, since persons who deal with an officer of the government are bound to know the extent of his power and authority.”

Georgia R. R. & B. K'g. Co., vs Wright, 124 Ga. 618.

Plaintiff in error relied in the lower courts and relies in this court largely upon the opinion in Fletcher vs Fuller, 120 U. S. 534.

That was a case between private parties.

The statutes of Georgia and decisions of its courts have fixed and determined the law of Georgia on the subject, and particularly as to the Western & Atlantic Railroad.

In Trustees of Caledonia County Grammar School vs Kent, 84 Vt. 12, the case of Fletcher vs Fuller was cited, but it was held that where plaintiff trustees of the grammar school *had no power to convey land*, dedicated to it for school purposes, grant of such land could not be presumed from lapse of time.

An examination of the opinion in Fletcher vs Fuller was made in Oregon &c R. Co. vs Grubissich, 206 Fed. 577 (C. C. A. 9th Ct.) and many observations made as to said opinion, which are of interest in the instant case. The case of U. S. vs Chavez, 175 U. S. 520 is cited and distinguished.

It is stated that the "Statutes of Oregon assume to declare upon what the presumption of title may be based," p. 583. (This is true as to the Statutes of Georgia.)

Further, that "the presumption of grant had its origin at the time when there was no registration of conveyances, and the muniments of title were subject to loss or destruction." (p. 583).

Further:

"Nor, according to the policy of the present laws of the States, is there a necessity for including a presumption to support long and uninterrupted possession; the policy of the law in that respect being definitely expressed in statutes of limitation, and in the provisions for the acquisition of title through short periods of adverse pos-

session. These statutes leave little or no room for the indulgence of the presumption of a grant."

And the court cited Wigmore on Evidence, Sec. 2522:

"But the systematic extension of the principle of acquisition by limitation, the reduction of the required possession to short periods, and (in the United States) the practice of compulsory registration of deeds of conveyance, have left little scope for the presumption."

Again, the court said, "Where the origin of a claim of title is known, there will be no presumption of a lost grant," and, "The presumption cannot arise where the claim is of such a nature as is at variance with the supposition of a grant."

In the instant case, "the origin of the claim of title is known," where the defendant below claimed under a grant; and where it claimed by adverse possession and prescription, as against the State of Georgia, "the claim is of such a nature as is at variance with the supposition of a grant."

In *United States vs Chavez*, 159 U. S. 452, the case really turned and was decided upon the proposition that the land (in New Mexico), came into possession of the claimants or their ancestors in 1833 and had been held by them ever since, and that these settlers were put "in juridical possession under a grant from the governor of

New Mexico, who, under the laws then in force, had authority to make the grant;" and the express provisions of the treaty between Mexico and the United States.

In *U. S. vs Devereaux*, 90 Fed. 182, no interest in the land involved was in the United States and, hence, it was held that, in a suit against a third person claiming the land adversely, it could stand only upon the rights of the trustee who held the title.

It was held, also, that the United States could not be prejudiced by any negligence or laches of its officers or agents, nor was it bound by any statute of limitations.

To push the doctrine of presumption to the extent contended for by plaintiff in error would be equivalent to saying: The statute of limitations will not run against the State, laches will not operate against the State, but prescription will—that is if possession has been long and peacefully continued it will be presumed that the right and title which the State had, has been granted by the State;—which is contrary to the rule established in Georgia, and other States, and recognized by this court.

And it is sought to apply it to a case where there is no room for presumption, since plaintiff in error claimed under alleged express grants from the State of 1852 and 1870.

Nor could the plaintiff in error rely upon presumption of a deed from the Augusta, Atlanta & Nashville Magnetic Telegraph Company to Hammett or Wylly.



Deeds to Hammett, under judicial sale, were shown as to property of the last above named corporation, but none as to any property upon or easement in the right of way of the Western & Atlantic Railroad. These deeds were later in date than the deeds of Hammett or Wylly to Morris et al. No evidence introduced or offered pointed to the even probable existence in the past of any conveyance from the corporation of the right of way or interest in it.

There was no evidence introduced or offered of any destruction of records in any but one of the six counties in Georgia and one in Tennessee through which the railroad runs. Nor of any such deed recorded or record thereof indicated in any of them; and the records in that one (Cobb) exist back to 1863.

Even in case of private parties it is not sufficient, for the aid of the presumption, that the party who asks it has proved title to the beneficial ownership and a long possession not inconsistent therewith. He must make it "not unreasonable to believe that the deed of conveyance, or other act essential to the title, was duly executed."

1 Greenleaf on Ev. Sec. 46.

## X.

### SUMMARY

1. The Garst & Bean contract and the Act of 1852 (the Act incorporating the Augusta, Atlanta & Nashville

Telegraph Company) are not and do not contain valid contracts of the State of Georgia. The Garst & Bean contract, besides its other infirmities, was not executed on behalf of the State by one authorized to do so. It was recognized that it was not and the attempt made by the subsequent Act (of 1852) to ratify it failed because the provisions of the Act were unconstitutional.

The prior decisions of the Supreme Court of Georgia sustain the ruling of that court in the instant case.

2. In the year 1870 the Western Union Telegraph Company, recognizing that it had not good title to the easement, sought to strengthen it by procuring a contract with the then Superintendent of the Western Atlantic Railroad, with the approval of the Governor. But this contract was not a contract of the State of Georgia. It was not made on behalf of the State by one authorized to make it.

It was made just before the State leased the road and appears to have been made with some secrecy, since the lessees asserted in 1872 that they had no knowledge of it when the lease was made. (Record p. 486).

From 1870 to the present the railroad has been in possession of and operated by various lessees of the same. The State has not operated it or recognized, in any way, the claims of the Telegraph Company.

In fact the Telegraph Company asserted in litigation with one of the lessees and the State that it was occupy-

ing the right of way under a contract of June 1884 with the lessee company; and it sought to "acquire" the use of the right of way by condemnation.

It is mere assumption to state that the State of Georgia or its lessees have received benefits from the alleged contracts of 1850, 1852 and 1870 which they would not otherwise have received; nor is there any evidence that the defendant below and its predecessors have not been fully compensated.

3. The validity of the contract of 1870 was not passed upon by this court. Neither the State of Georgia nor the present lessee was a party to the case of the Western Union Tel. Co. vs Western & Atlantic Railroad Company, 91 U. S. 283. The State of Georgia has had no benefit from that contract. It was not enabled thereby to make a more advantageous lease. The lessees in the lease made in 1870 had never heard of it until after the lease was made; nor has the State or the then or succeeding lessees continued to accept the benefit of that contract.

4. No law has been enacted by the State of Georgia impairing the obligation of any contract with the Western Union Telegraph Company or its predecessors; and neither the petition for certiorari nor the writ of error present a case calling for the intervention of the powers of this court, or a reversal of the court below.

5. For many years the Telegraph Company has been occupying the railroad right of way and enjoying the

use of the same and the revenue derived therefrom, without lawful right. Some thirteen years have passed since it, itself, terminated the contract of 1884 by virtue of which it occupied the right of way, and sought to "acquire" the right by condemnation. It has for all that time remained in possession, without any contract right or recognition of any right of the State or the lessee. During all that time it has had the use of the right of way, in controversy with the State and lessee and with no benefit, of any sort, to either.

The decree of the lower court that it should now give up that possession is just and, we respectfully claim, should be affirmed.

Respectfully Submitted,

FITZGERALD HALL, of Nashville, Tenn.  
HENRY C. PEEPLES, of Atlanta, Ga.  
HOOPER ALEXANDER, of Atlanta, Ga.  
Attorneys for State of Georgia and  
Nashville, Chattanooga St. Louis, Ry.

Tye, Peebles Tye of Counsel.



①

✓

# SUPREME COURT OF THE UNITED STATES.

No. 24.—OCTOBER TERM, 1925.

26  
3

Western Union Telegraph Company,  
Plaintiff in Error,

vs.

The State of Georgia as owner of West-  
ern and Atlantic Railroad, and Nash-  
ville, Chattanooga and St. Louis  
Railway as Lessee, etc.

In Error to the Supreme  
Court of the State of  
Georgia.

[November 16, 1925.]

Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit by the State of Georgia and the Nashville, Chattanooga and St. Louis Railway for a decree enjoining the Western Union Telegraph Company from occupying or using any part of the right of way of the Western and Atlantic Railroad, a road built and owned by the State and let by it to the Railway company that joins with it as a plaintiff in this suit. The Telegraph Company claims a perpetual right of way over the State owned road by virtue of three alleged contracts. The trial Court decided that the Telegraph Company had no right in the premises, ordered it to remove its wires, poles and structures from the plaintiff's right of way within twelve months from the final determination of the cause, and enjoined it from occupying or using the right of way after that time. This decree was affirmed by the Supreme Court of Georgia by an equally divided Court. 156 Ga. 409. The case is brought here by writ of error on the ground that the statutes warranting these proceedings impaired the obligation of the alleged contracts. There is also a petition for a writ of certiorari filed out of caution, but the only federal question is that raised by the writ of error and therefore the petition for a writ of certiorari is denied.

The first, and in this case the only question to be decided is whether the statutes relied upon have been given an effect impairing the obligation of any contract that the Telegraph Company may have. The statutes are an Act of November 30, 1915, and one

of August 4, 1916, amending the former. The Act of 1915 provided for the letting of the Western and Atlantic Railroad and created a Commission to determine among other things the extent and character of every use of the right of way by anyone other than the lessee, and the authority for the same. The Commission was to prepare bills for the General Assembly carrying into effect any recommendation that it might make with respect to what steps should be taken to assert the title of the State to any part of the right of way or the road that might be adversely used. By the amendment the Commission was given power to deal with encroachments on the way and to determine whether they should be moved and discontinued and to take such action as it deemed proper to cause the removal, and to that end "the Commission is authorized and empowered to institute and prosecute, in the name and behalf of the State of Georgia, such suits and other legal proceedings as it may deem appropriate in protection of the State's interest, or the assertion of the State's title." Under this statute the Commission, reciting that it was advised by its counsel that the occupation of the way by the Telegraph Company was without lawful authority, resolved that the counsel be instructed to institute suit for the removal of the encroachment in the name of the State provided that the lessees should join in the suit and pay the costs. Thereupon this proceeding was begun.

This is all, and it is not enough to give the Telegraph Company a standing here. The statutes do not prejudice the Telegraph Company's case, or any case. They do not purport to subject the Company to any prohibition or command, or to determine or qualify the Company's rights; they do not attempt to delegate power to do so to the Commission. They do not even point out the Telegraph Company. So far as material to this case they simply authorize the Commission to inquire, and in case it finds any encroachment that it believes unlawful, to sue. In *Columbia Ry., Gas & Electric Co. v. South Carolina*, 261 U. S. 236, the State law undertook to treat what this Court held to be only a covenant as a condition subsequent and as having entailed a forfeiture. The suit was brought upon this statute and a judgment rendered for the State in its courts was held to have given effect to the statutory attempts to enlarge the obligations of the Railway Company under a grant from the State. The difference between that case and this is plain. A mere authority to test disputed rights by a suit does

not impair the obligation of a contract upon which a defendant relies. When a claim is set up under a contract the Constitution does not forbid litigation to decide whether one was made or what it means. *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142, 149. *Mercantile Trust & Deposit Co. v. Columbus*, 203 U. S. 311, 321. *Des Moines v. Des Moines City Ry. Co.*, 214 U. S. 179. *South Covington & Cincinnati Street Ry. Co. v. Newport*, 259 U. S. 97, 99, 100.

The statutes in question are still more remote from those which while valid on their face are construed by the State Courts to apply to a matter not subject to state control. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282. Here there was no attempt to control otherwise than by the result of a suit in which the Telegraph Company could set up all its alleged contracts and protect all its constitutional rights. The plaintiff in error shows no law impairing the obligation of contracts and therefore no ground for coming here. See *Cross Lake Shooting & Fishing Club v. Louisiana*, 224 U. S. 632, 639; *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 452.

*Writ of error dismissed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

J43873